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No. 84-437

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE EVENING NEWS ASSOCIATION, PETE WALDMIER, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY AND JIM GRAHAM,
Petitioners,

v.

JOSEPH JUDEUS LOCRICCHIO AND GARY FRANCELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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QUESTION PRESENTED

May A State Constitutionally Permit Libel Plaintiffs To Pursue To Judgment Libel Claims Arising Out Of A Series Of News Articles Containing Over 10,000 Words Without Ever Disclosing To Media Defendants What Statements, If Any, In The News Articles Are Claimed To Be Factually False?

Although petitioner The Evening News Association is a corporation, it has no parent companies, no subsidiaries other than those wholly owned by petitioner and no affiliates.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

The Petitioners, The Evening News Association, *et al.*, respectfully pray that a writ of certiorari issue to review the orders of the Supreme Court for the State of Michigan entered in this case on April 27 and June 29, 1984.

OPINIONS AND ORDERS BELOW

The Order of the Circuit Court for the County of Wayne, State of Michigan, not reported, appears in Appendix A hereto, at 1a. The Opinion of the Michigan Court of Appeals, not reported, appears in Appendix B hereto, at 3a. The Order of the Michigan Court of Appeals denying Petitioner's Application for Rehearing, not reported, appears in Appendix C hereto, at 7a.

The Order of the Supreme Court for the State of Michigan denying Petitioner's Application for Leave to Appeal, reported at 419 Mich. 865 (1984), appears in Appendix D hereto, at 9a. The Order of the Supreme Court for the State of Michigan denying Petitioner's Motion for Reconsideration, not reported, appears in Appendix E hereto, at 11a.

JURISDICTION

The Order of the Supreme Court for the State of Michigan denying Petitioner's Application for Leave to Appeal was entered on April 27, 1984. The Order of the Supreme Court for the State of Michigan denying Petitioners' Motion for reconsideration was entered on June 29, 1984. This Petition for Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., amend. XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents, along with several businesses and corporations which they control, are the developers and primary operators of the nationally-famous Pine Knob Entertainment Complex. Petitioners are The Evening News Association, which publishes The Detroit News; Bill Giles, former editor and vice-president of The Detroit News; and current and former reporters, staff writers and columnists for The Detroit News.

During the course of their public careers, the Respondents have been investigated by the United States Justice Department, charged with organized crime involvement, subpoenaed to testify to at least one federal grand jury, indicted by one federal grand jury and pled guilty to that federal criminal charge that they knowingly made false statements to a federally-insured bank.

As the Respondents were developing Pine Knob, the media, including The Detroit News, reported on the criminal proceedings involving the Respondents, their involvement with the Aladdin Hotel in Las Vegas, and their business and personal associations with convicted felons and identified organized crime figures.

Respondents filed suit on April 3, 1980 based on eleven Detroit News reports dated from April 27, 1977 through April 25, 1979.[1] Two Amended Complaints were subsequently filed. The original Complaint and the Amended Complaints allege in conclusory terms that the news reports charged Respondents with criminal conduct or conduct of an immoral or reprehensible nature. None of the Complaints set forth the statements contained in the news reports upon which Respondents base their defamation claims or which they claim to be factually false.

Throughout the course of the proceedings in the trial court, Petitioners made repeated efforts to discover what

[1] The first three Counts of Respondents' Complaint purport to allege defamation claims. Only those three Counts are the subject of this Petition.

statements, if any, in these publications the Respondents claim to be factually false. Initially, Petitioners moved for summary judgment *inter alia* on the ground that Respondents' original Complaint failed as required by Michigan defamation law to set forth the falsified defamatory statements complained of. The Wayne County Circuit Court, Honorable Susan D. Borman, denied that motion.

Petitioners then filed three sets of Interrogatories requesting that as to each statement in three of the complained of news reports, Respondents answer whether that statement was claimed to be false. The trial court sustained Respondents' objections to said Interrogatories as burdensome and oppressive.

Lastly, Petitioners filed a single set of Interrogatories requesting Respondents to identify which statements they contended were false statements of fact. After Respondents' objections to these latter Interrogatories were denied, Respondents answered that they did not base their libel claims on any false statement of fact in the ten thousand plus words contained in the news reports. Rather, Respondents answered that they based their libel claims on the allegedly false portrayal, implications, imputations or insinuations allegedly arising from the admittedly true statements. Their exact answer read in relevant part:

> In regard to Interrogatory 1(a), plaintiffs, Joseph JUDEUS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that *the defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article*, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia"; individuals of low moral and character; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agree-

ments and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.

(emphasis added).

Based on Respondents' answers as set forth above, Petitioners moved for summary judgment as to the libel claims on the ground that there was no genuine issue of any material fact that the statements complained of were true, and thus Respondents could not maintain an action for libel as a matter of Michigan and Federal Constitutional law.[2] Respondents resisted the motion on the ground that the allegedly false implications and innuendoes arising from the publications in question would support their libel claims, although they were not alleging the falsity of any of the underlying statements of fact. The trial court denied Petitioners' motion. (Appendix A, at 1a)

By Order dated August 5, 1982, the Michigan Court of Appeals granted Petitioners' Application for Leave to Appeal. On appeal, Petitioners contended *inter alia* that to permit Respondents to proceed with their libel claims when they had not and could not identify any false statement of fact, was contrary to controlling Michigan authority and was further a deprivation of the Petitioners' rights under the First Amendment to the United States Constitution.[3]

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[2] Paragraph 6 of Petitioners' Motion, dated March 12, 1982, stated in pertinent part:

> As a matter of Federal constitutional law and as a matter of Michigan common law, a libel plaintiff must prove . . . that the complained of publication contained false statements of fact. (Appendix F, at 15a)

[3] In Petitioners' Brief on Appeal to the Court of Appeals, the Petitioners presented argument under the heading: "As a Matter of Federal Constitutional Law a Libel Claim Must Be Based on False Statements." (Appendix G, at 38a)

On August 24, 1983, the Court of Appeals issued its Per Curiam Opinion denying Petitioners' appeal. (Appendix B, at 3a) The Court of Appeals held that Respondents had stated a claim for libel and had raised a genuine issue of material fact on the issue of falsity in relying on the allegedly false implications and insinuations, notwithstanding that Respondents had not and could not identify any statement of fact contained in the news reports which they claim is false, and notwithstanding that Respondents' Complaints give Petitioners absolutely no notice of what they are called upon to defend in this action. The Court of Appeals did not reach the constitutional questions presented. The Court of Appeals denied Petitioners' Application for rehearing on October 17, 1983. (Appendix C, at 7a)

Petitioners next sought leave to appeal to the Michigan Supreme Court. Petitioners again asserted that to allow Respondents to pursue their defamation claims was contrary to controlling Michigan authority and a deprivation of the freedom of speech and press rights guaranteed to Petitioners under the First Amendment.[4] The Michigan Supreme Court denied leave to appeal on April 27, 1984. (Appendix D, at 9a) That Court further denied Petitioners' Motion for Reconsideration on June 29, 1984. (Appendix E, at 11a)

[4] In Petitioners' Brief in Support of Application for Leave to Appeal to the Michigan Supreme Court, Petitioners presented argument under the heading: "It is an Unconstitutional Infringement on First Amendment Freedoms for a Publisher to be Held Liable For Defamation Without Allegation and Proof of Factual Falsity." (Appendix H, at 74a)

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS OF THE MICHIGAN COURTS CONFLICT IN PRINCIPLE WITH DECISIONS OF THIS COURT.

Permitting Respondents To Proceed to Judgment on Their Libel Claims Without Giving Notice to Petitioners of What Statements Are Claimed To Be Factually False Deprives Petitioners of Their First Amendment Rights Without Due Process of Law.

Introduction

Petitioners find themselves in the preposterous position of having to prepare for a libel trial, involving over ten thousand words, in eleven separate articles, having been given no precedent notice of exactly what statements they are being called upon to defend. This state procedure violates all notions of fundamental fairness and deprives the Petitioners of their First Amendment rights without due process of law, in patent violation of the Fourteenth Amendment to the United States Constitution.

Since this Court's landmark decision in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), this Court has grappled with the striking of an equitable balance between the First Amendment's protection of freedom of speech and of the press on the one hand, and the States' interest in protecting the reputations of their citizens on the other hand. In striking this balance, the Court has accorded the States some measure of protection depending on the status of persons reported on. *See,* e.g., *New York Times, supra; Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974).

While the States have been afforded some latitude in devising substantive and procedural rules of law in protecting the reputations of their citizens, well-settled doctrine dictates that States must exercise this power by the least restrictive means available. This is to assure that State rules of law go no further than is necessary to accomplish their

recognized legitimate interests and do not impermissibly trample upon fundamental rights of free speech and due process of law.

The Michigan Court of Appeals in this case has clearly exceeded the latitude afforded by this Court to the States in protecting the reputation interests of their citizens. It has adopted a procedural rule of law which impermissibly threatens to impose liability on speakers of constitutionally protected speech.

A fundamental tenet of due process of law is the granting of meaningful notice to a defendant of exactly what he is called upon to defend. Only with meaningful notice can a defendant adequately prepare for and conduct his defense of charges asserted against him. This is no less true in an action for publication of allegedly libelous statements.

Four years after this action was instituted, and now on the eve of trial, Petitioners have yet to receive any meaningful notice of what they are to defend in this action. The Court of Appeals has ruled, in effect, that Respondents need never disclose to Petitioners what statements of fact they claim to be false and defamatory. Such a procedure simply does not comport with the requirements of due process of law.

Decisions of this Court have settled that a libel plaintiff must prove a false statement of fact as a prerequisite to the constitutional imposition of liability in a libel case. Due process of law requires that Petitioners be informed exactly what statements Respondents will rely on at trial to sustain this burden. The Court of Appeals' decision deprives Petitioners of their due process rights in this regard and portends grave injury to constitutionally protected speech.

Respondents Must Prove a False Statement of Fact.

This Court first recognized constitutional protection for allegedly libelous statements in *New York Times, supra,* 376

U.S. 254 (1964). Decided in the context of criticism of official conduct, the Court held that factual error was a necessary, though not sufficient, prerequisite for the constitutional imposition of liability on a publisher of allegedly libelous statements.

> If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.

(emphasis added) *Id.*, 376 U.S. at 273.

In reviewing the specific allegations of falsity in that case, the Court again emphasized that the issue of factual falsity is one of constitutional magnitude.

> The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that 'truckloads of police . . . ringed the Alabama State College Campus' after the demonstration on the State Capitol steps, and that Dr. King had been 'arrested . . . seven times.' These statements were false only in that the police had been 'deployed near' the campus but had not actually 'ringed' it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. *The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here.*

(emphasis added) *Id.*, 376 U.S. at 289. Certainly if imposing liability on the making of "slight inaccuracies" raised serious constitutional problems, the imposition of liability on the making of completely true statements would fly in the face of First Amendment protections.

Decided that same term was the case of *Garrison* v *Louisiana*, 379 U.S. 64 (1964), in which this Court struck down as unconstitutional a state statute which allowed for imposition of liability on the making of true statements if actuated by malice. Quoting with approval from *State* v. *Burnham*, 9 N.H. 34, 42-43 (1837), the Court noted:

> 'If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. . . .'

Id., 379 U.S. at 73. The Court then squarely disposed of this issue in holding that:

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.

Id., 379 U.S. at 74.

The protection of the *New York Times* Actual Malice standard was extended to publications concerning public figures in *Curtis Publishing Co., supra*, 388 U.S. 130 (1967). As in *New York Times*, the Court held that factual falsity was a necessary prerequisite to the constitutional imposition of liability.

> While the *truth of the underlying facts* might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm . . . we have rejected, in prior cases involving materials and persons commanding justified and important public interest, the argument that a finding of falsity alone should strip protections from the publisher.

(emphasis added) *Id.*, 388 U.S. at 152.

The protection of the *New York Times* Actual Malice standard was further extended to labor disputes in the case of *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974). In *Letter*

Carriers, the plaintiffs complained of, among other things, Jack London's definition of a "Scab", which stated in part:

> 'Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*
>
> *Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.*'

(emphasis in original) *Id.*, 418 U.S. at 268. The plaintiffs contended that this definition of a "SCAB" implied that they were "traitors", were "lacking 'character' " and had "rotten principles". *Id.*, 418 U.S. at 283. The Court held, however, that plaintiffs had not satisfied their burden of proving factual falsity.

> We believe that publication of Jack London's rhetoric is equally entitled to the protection of the federal labor laws. The *sine qua non* of recovery for defamation in a labor dispute under *Linn* is the existence of *falsehood*. Mr. Justice Clark put it quite bluntly: 'the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.' 383 U.S. at 63. Before the test of reckless or knowing falsity can be met, *there must be a false statement of fact*. *Gertz* v. *Robert Welch Inc.*, *post*, at 339-340.

(emphasis added, footnote omitted) *Id.*, 418 U.S. at 283-284.[5]

In *Gertz* v. *Robert Welch*, *supra*, 418 U.S. 323, this Court declined to extend the *New York Times* Actual Malice test to publications concerning private persons. The

[5] While the Court decided *Letter Carriers* on the basis of federal labor law, Justice Douglas noted that the same result would obtain under the First Amendment. *Id.*, 418 U.S. at 287, concurring opinion.

Court did not, however, retreat from the principle that a finding of factual falsity is constitutionally required for the imposition of liability.

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in *false statements of fact.*
>
> * * *
>
> [P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his *factual assertions* may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious *statements* does not accord adequate protection to First Amendment liberties.
>
> * * *
>
> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

(emphasis added) *Id.*, 418 U.S. at 339-340, 347. (See also page 348 referring to the requirement of a "factual misstatement".)

Gertz teaches several things. First, regardless of the standard of liability employed, a fundamental prerequisite to the constitutional imposition of liability is the finding of a "factual misstatement" or "false statement of fact." So long as the publisher has printed only the truth, as in this case, liability cannot be constitutionally imposed.

Second, *Gertz* counsels that liability may not be imposed without fault. Common sense dictates that to avoid imposing liability without fault, the burden must be placed on the plaintiff to prove factual falsity. This was the holding of the Sixth Circuit in *Wilson* v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), where the Court reasoned:

> Tennessee follows the common law rule developed during the era of strict liability in defamation cases. At common law, prior to the application of constitutional standards in the area of libel and slander, the *truth* of the *defamatory statement* was an affirmative defense for the defendant to prove. . . . Although falsity was an element of a cause of action for defamation . . ., once a statement was shown to be defamatory, falsity was presumed.
>
> * * *
>
> The Supreme Court has said that before the status quo is changed judicially in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. Falsity is an element of fault under the First Amendment that should be proved and not presumed. . . .As a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity.

(emphasis added, citations omitted) *Id.*, 642 F.2d at 374, 376.

The reason factual falsity is subsumed in the concept of fault and relates only to "false statements of fact" comes into even sharper focus when one considers whether or not the defendant has met his standard of care. Whatever that standard of care may be, whether negligence or Actual Malice, against what would we measure it if it relates to unexpressed and unprinted implications and innuendoes? What more can a defendant do but check the accuracy of what he is going to print? How could the Court or a jury determine whether the defendant used due care or acted

without Actual Malice in assuring the accuracy of something he never printed? How does anyone check the accuracy of something he never said and has no intention of saying? To even contemplate the congeries of problems presented by a rule of law that holds a publisher responsible for the truth or falsity of unexpressed and unprinted implications or innuendoes points up the absurdity of the Respondents' position in this case.

Lastly, *Gertz* provides that "there is no such thing as a false idea." *Id.*, 418 U.S. at 339. Unexpressed and unprinted implications and innuendoes are, at most, unexpressed and unprinted "ideas". Because there is no such thing as a false idea, Respondents cannot sustain their constitutional burden of proving factual falsity with reference to such apocryphal implications and innuendoes.

Due Process Requires That Petitioners Be Given Precedent Notice of the Statements Which Respondents Claim To Be Factually False.

Given that a libel plaintiff must prove a false statement of fact, the focus shifts to the procedure endorsed by the Michigan Courts in this case for the resolution of Respondents' libel claims. While the States have been given some freedom to regulate in areas touching upon basic constitutional rights, they must do so in the least restrictive manner so as to avoid imposing impermissible burdens on the exercise of such rights.

In *NAACP* v. *Button*, 371 U.S. 415 (1963), this Court struck down as unconstitutionally vague and overbroad a state statute regulating the improper practice of law as infringing on the First Amendment's right of freedom of association. In reaching the decision, the Court noted:

> [S]tandards of permissible statutory vagueness are strict in the area of free expression.
>
> * * *

> Broad prophylactic rules in the area of free expression are suspect. . . .Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

(citations omitted) *Id.*, 371 U.S. at 432, 438. Similarly, in *Gooding* v. *Wilson*, 405 U.S. 518 (1972), this Court struck down as unconstitutionally vague and overbroad a statute seeking to punish the uttering of "opprobrious words or abusive language", noting in part:

> '[I]n every case the power to regulate must be exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' . . . 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *NAACP* v. *Button, supra,* at 433.

(citation omitted) *Id.*, 405 U.S. at 522.

In consonance with the above rule, this Court has repeatedly examined state rules of law which threaten to stifle the exercise of constitutionally protected freedoms. This has been especially true in the area of free speech. In *Winters* v. *New York*, 333 U.S. 507 (1948), this Court struck down as vague and overbroad a state statute regulating the sale of "obscene" materials.

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. . . . A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press.

(citations omitted) *Id.*, 333 U.S. at 509-510. Similary, in *Cramp* v. *Bd. of Public Instruction*, 368 U.S. 278 (1961), this Court struck down as unconstitutional Florida's requirement that teachers take an oath that they had never lent aid, support, advice, ccunsel or influence to the Communist Party.

> The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. As we said in *Smith* v. *California*, ' . . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' 361 U.S. 147, at 151. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.' *Stromberg* v. *California*, 283 U.S. 359, 369.

Id., 368 U.S. at 287-288. For other similar cases, *see: Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974); *Interstate Circuit* v. *Dallas*, 390 U.S. 676 (1968); *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

This doctrine is not limited to statutes or other substantive rules of law. It is equally applicable to procedural rules of law which threaten to invade protected freedoms, especially freedom of speech. In *Speiser* v. *Randall*, 357 U.S. 513 (1958), this Court condemned as unconstitutional a

procedural rule which placed the burden of proof on veterans to prove that they were not engaged in unlawful advocacy to be entitled to a state property tax exemption. In so ruling, the Court noted:

> To experienced lawyers it is commonplace that the outcome of a lawsuit — and hence the vindication of legal rights — depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. *Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.* And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. Cf. *Powell* v. *Alabama*, 287 U.S. 45, 71. When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights — rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, . . . *the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.*

(emphasis added, citations omitted) *Id.*, 357 U.S. at 520-521. Similarly, in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), this Court examined procedures employed in non-criminal censorship proceedings involving motion pictures. The Court noted in part:

> '[U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.' *Marcus* v. *Search Warrant*, 367 U.S. 717, 731.

Id., 380 U.S. at 57. Lastly, in *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968), this Court found unconstitutional a process by which an *ex parte* restraining order against a political rally was obtained, stating in part:

> As the Court said in *Freedman* v. *Maryland, supra*, at 58, a noncriminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'
>
> * * *
>
> In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Id., 393 U.S. at 181, 183-184.

Applying the foregoing rules to this case, it is clear that the procedure adopted by the Michigan Court of Appeals fails to pass constitutional muster. The rule of law adopted affords a libel defendant absolutely no notice of what he is called upon to defend and threatens to stifle protected speech.

The inhibiting effect on speech under such a procedure is plain. It is one thing for a speaker or publisher to fear the institution of libel actions where the complained of statements are to be specified in the complaint. In such cases, through discovery and pre-trial motions, the frivolous claims can be disposed of without the costs and disruption of lengthy trials and/or post-trial appeals, and the non-frivolous case can be adequately prepared for defense. It is quite another thing to fear the imposition of libel suits where the plaintiff need never disclose which, if any, statements he claims to be factually false. In such cases, it is literally impossible to dispose of even the most frivolous cases prior to trial and/or post-trial appeal, let alone adequately prepare for trial.

Such a rule of law also portends a grave danger of punishing legitimate and constitutionally protected speech. Without specification of the complained of statements, how is a libel defendant to proceed through discovery and adequately prepare its defense? Is not unfair surprise at trial an inevitable result of such a rule? How are the Petitioners to prepare to meet Respondents' proofs regarding amorphous, unprinted and unexpressed implications and innuendoes? Is there not posed a grave danger of incorrect and unjust results because of ill-defined pleadings and issues and ill-prepared cases? Clearly the danger of imposing liability on protected speech is greatly heightened by a procedure which allows a libel plaintiff to proceed to trial and judgment without ever informing the defendant which statements will be at issue at the trial.

Furthermore, the State of Michigan has not adopted the least restrictive means in exercising its right of protecting the reputation interests of its citizens. The procedural rule adopted by the Court of Appeals goes much further than is even reasonable, let alone necessary, for the vindication of reputation interests and at the same time creates the threat of long, costly trials in every libel suit filed and of erroneous determinations on the evidence. Conversely, requiring a libel plaintiff to merely state in his complaint which statements he claims to be factually false, imposes no meaningful obstacle to the prosecution of his action, but at the same time affords the defendant appropriate safeguards guaranteed by the First and Fourteenth Amendments.

Due process requires meaningful notice and an opportunity to defend. The procedure adopted by the Michigan Court of Appeals deprives Petitioners of meaningful notice and an opportunity to defend, and thereby deprives Petitioners of their First Amendment rights without due process of law.

2. THE QUESTION PRESENTED INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The effect of the decision of the Michigan Court of Appeals extends well beyond this libel action against Petitioners. It affects the free speech rights of every citizen of the State of Michigan.

To say the least, the decision of the Court of Appeals has a direct, chilling effect on the First Amendment rights of the Petitioners. However, the decision's threat to fundamental First Amendment rights extends much further and cuts much deeper than this case or these parties. Until the Michigan Court of Appeals' decision is corrected, citizens of the State of Michigan cannot write or say anything without the fear of long, costly libel actions wherein they will not receive any notice of or be permitted to discover just what they are being called upon to defend.

The Court of Appeals' decision is wrong as a matter of Federal Constitutional Law. It effectively destroys guaranteed First and Fourteenth Amendment rights in the State of Michigan by not requiring that a libel plaintiff inform the defendant of what statements, if any, he claims to be factually false. As a matter of Federal Constitutional law, a libel plaintiff must afford the defendant notice of exactly what statements he is called upon to defend. This is an issue which cries out for this Court's immediate attention.

CONCLUSION

In striking the balance between First Amendment rights of free speech and the States' interests in protecting the reputation interests of their citizens, this Court has afforded the States some leeway in exercising this right. The States are constitutionally bound, however, to adopt only procedures which comport with the First and Fourteenth Amendments to the United States Constitution.

The Constitution requires that a libel plaintiff prove a false statement of fact in a libel action. The States are not free to disregard this constitutional burden of proof.

The Constitution further provides that in seeking to vindicate the reputation interests of their citizens, the States must adopt rules of law and procedure which only go so far as is necessary to accomplish this purpose and which do not impermissibly trample on protected freedoms. The States are no more free to disregard this constitutional requirement.

The Michigan Court of Appeals' decision in this case simply transcends constitutional boundaries in seeking to vindicate the reputations interests of Michigan citizens. It provides a rule of law which inhibits the legitimate exercise of free speech, which is not reasonably necessary to accomplish the State's purpose and which gravely threatens to punish legitimate and constitutionally protected speech. It is thus constitutionally infirm.

Due process of law requires, at a minimum, meaningful notice of what a person is called upon to defend. In a libel case, this requires, at a minimum, notice to the defendant of what statements the plaintiff contends are factually false. Petitioners herein seek only what due process commands, meaningful notice of what statements they are called upon to defend.

For the reasons hereinabove stated, a writ of certiorari should issue to review the decisions of the Michigan Courts.

Respectfully submitted,
RICHARD E. RASSEL
JAMES E. STEWART
KEEFE A. BROOKS

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Telephone: (313) 963-8142

Counsel for Petitioners

Dated: September 19, 1984

APPENDIX

Appendix A
(Entered: April 6, 1982)

APPENDIX A
(Entered: April 6, 1982)

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs,

HON. SUSAN D. BORMAN

VS.

NO: 80-012-145 CZ

THE EVENING NEWS ASSOCIATION,
INC., a Michigan Corporation,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
ROBERT ANKENY, and JIM GRAHAM,
Jointly and Severally,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' LIBEL CLAIMS

At a session of said Court, held in the County of Wayne, State of Michigan on April 2, 1982

PRESENT: Honorable Susan D. Borman
Circuit Judge

Upon the reading and filing of defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, and the Court being otherwise fully advised in the premises;

Appendix A
(Entered: April 6, 1982)

IT IS HEREBY ORDERED that defendants Motion for Summary Judgment as to Plaintiffs' Libel Claims is denied.

(s) SUSAN D. BORMAN
Circuit Judge

Approved as to form:

By: JEREMIAH J. KENNEY (P 24810)
Attorney for Plaintiffs
2000 Buhl Building
Detroit, Michigan 38226

By: JAMES E. STEWART (P 23254)
Attorney for Defendants
1881 First National Bldg.
Detroit, Michigan 48226

Appendix B
(Entered: August 24, 1983)

APPENDIX B
(Entered: August 24, 1983)

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs-Appellees,

v

No. 64729

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES,
JEFF LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
and ROBERT ANKENY,
Defendants-Appellants.

BEFORE: V.J. Brennan, P.J., M.H. Wahls and M. Dodge*, JJ.

PER CURIAM

This lawsuit arises out of a series of eleven allegedly defamatory articles published in the Detroit News between April 27, 1977 and April 25, 1979 concerning the activities of plaintiffs Locricchio and Francell with regard to their development and operation of the Pine Knob entertainment complex. Defendant, the Evening News Association, Inc., publishes the Detroit News, defendant Giles is its editor and Vice-President, and the remaining defendants are reporters, staff writers, and columnists for the Detroit News.

On April 3, 1980, plaintiffs filed a ten-count complaint, the first three counts of which allege a cause of action for libel based on the news articles. The articles, consisting of in excess of 10,000 words, accompanied the complaint. On October 7, 1981, defendants filed interrogatories requesting, among other things, that plaintiffs identify with particularity

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* Circuit Judge, sitting on the Court of Appeals by assignment.

each and every statement claimed to be defamatory, and each and every statement claimed to contain false statements of fact in each publication relied upon by plaintiffs in support of their libel claims. Plaintiffs responded in part as follows:

> "*[T]he defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organizea criminal society, otherwise known as the 'Mafia'; individuals of low moral and character;* that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.
>
> * * *
>
> "As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, *the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, the full portrayal, implication, imputation and/or insinuation can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other.* Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes self-evident." (Emphasis added.)

Based on these answers, defendants moved for summary judgment, GCR 1963 117.2(3). The trial court denied the motion. Defendant take this interlocutory appeal by leave granted.

Appendix B
(Entered: August 24, 1983)

Defendants assert on appeal, as they did in support of their motion for summary judgment, that no action for libel exists here because plaintiffs admit that their allegations of defamation are not based on a specific false statement in any particular article. Defendants contend that plaintiffs' allegations that the entire series of articles falsely portrayed plaintiffs as members or associates of an organized criminal society, known as the "Mafia", cannot support an action for libel.

We disagree. " 'To test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.' " *Sanders* v *Evening News Association*, 313 Mich 334, 340; 21 NW2d 152 (1946). The pleadings, including plaintiffs' answers to the interrogatories, raise a genuine issue of material fact as to whether the specified articles, read as a whole, carry a defamatory insinuation or inference that plaintiffs are associated with organized crime. Insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion. See *Caldwell* v *Crowell Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5); *cert den*, 332 US 776 (1947), *Memphis Publishing Co* v *Nichols*, 569 SW2d 412, 419-420 (Tenn 1978), 50 Am Jur 2d, Libel and Slander, §13, pp 528-529, Prosser, *Torts*, (4th ed, 1971), §111.

Plaintiffs did not concede the truth of the alleged insinuation. They specifically state in their response to interrogatories that the entire series of articles represented "a *false* portrayal implication, imputation and/or insinuation" that plaintiffs are or were members and/or associates of an organized criminal society, otherwise known as the Mafia.

The pleadings have given rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment.

Appendix B
(Entered: August 24, 1983)

The trial court properly denied defendant's motion for summary judgment.

Affirmed.

/s/ V.J. Brennan
/s/ M.H. Wahls
/s/ M. Dodge

APPENDIX C
(Entered: October 17, 1983)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Seventeenth day of October in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable
VINCENT J. BRENNAN
Presiding Judge
MYRON H. WAHLS
MICHAEL E. DODGE
Judges

JOSEPH JUDEUS LOCRICCHIO And
GARY FRANCELL,
Plaintiffs-Appellees,

v

Docket #64729
L.C. #80 012 415 CZ

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
And ROBERT ANKENY,
Defendants-Appellants.

In this cause an application for rehearing having been filed by defendants-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

Appendix C
(Entered: October 17, 1983)

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 24th day of October in the year of our Lord one thousand nine hundred and eighty-three.

(s) Ronald L. Dzierbicki
Chief Clerk

Appendix D
(Entered: April 27, 1984)

APPENDIX D
(Entered: April 27, 1984)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of April in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

72978
& (39)

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs-Appellees,

v

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES,
JEFF LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILING,
ROBERT ANKENY and JIM GRAHAM,
jointly and severally,
Defendants-Appellants.

SC: 72978
COA: 64729
LC: 80-012-145-CZ

On order of the Court, the motion for extention [sic] of time to file answer is considered, and it is GRANTED.

Appendix D
(Entered: April 27, 1984)

The application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should now be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 27th day of April in the year of our Lord one thousand nine hundred and eighty-four.

[SEAL]

(s) Jacqueline B. MacKinnon
Deputy Clerk

Appendix E
(Entered: June 29, 1984)

APPENDIX E
(Entered: June 29, 1984)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of June in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices

72978(45)

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs-Appellees,

v

EVENING NEWS ASSOCIATION, INC., PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, jointly and severally,
Defendants-Appellants.

SC: 72978
COA: 64729
LC: 80-012-145-CZ

On order of the Court, the motion by defendants-appellants for reconsideration of this Court's order of April 27, 1984, is considered, and the motion is DENIED, because it does not appear that the order was entered erroneously.

Appendix E
(Entered: June 29, 1984)

0625

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 29th day of June in the year of our Lord one thousand nine hundred and eighty-four.

[SEAL]

(s) Corbin R. Davis
Clerk

Appendix F

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

JOSEPH JUDEUS LOCHRICCHIO
and GARY FRANCELL,
Plaintiffs,

vs

THE EVENING NEWS ASSOCIATION INC.,
a Michigan Corporation, PETER
WALDMIER; BILL GILES; JEFF LADERMAN;
MICHAEL F. WENDLAND; JEAN GADOMSKI;
RICHARD WILLING; ROBERT ANKENY; JIM
GRAHAM; and GENE GUIDI, Jointly and
Severally,
Defendants.

MOTION FOR SUMMARY JUDGMENT
AS TO PLAINTIFFS' LIBEL CLAIMS

Defendants, The Evening News Association, Pete Waldmeir, Bill Giles, Jeff Laderman, Michael F. Wendland, Jean Gadomski, Richard Willing, Robert Ankeny and Jim Graham, move for summary judgment pursuant to GCR 1963, 117.2(3), for the following reasons:

1. Plaintiffs filed a ten-count Complaint against defendants on April 3, 1980.

2. Counts I, II and III of plaintiffs' Complaint allege causes of action for libel based solely on the publication by The Detroit News of some eleven news reports spanning the period from April 27, 1977 through April 25, 1979.

3. By Order of August 19, 1981, this Court dismissed plaintiffs' libel claims as to The Detroit News' reports published April 27, 1977, May 4, 1977, May 5, 1977, October 6, 1977 and March 29, 1977.

4. Defendants sent a Fourth Set of Interrogatories requesting plaintiffs to identify which statements in various complained of news reports they claimed to be defamatory, which statements they claimed to be false, and which documents or witnesses they would rely on to support their allegations that certain statements were defamatory or false. A copy of this Fourth Set of Interogatories is Attachment 1 hereto. Plaintiffs objected to these interrogatories, but on December 4, 1981, the Court ordered that they be answered.

5. Plaintiffs filed answers to this Fourth Set of Interrogatories on February 24, 1982 and stated, in relevant part, as follows:

> "In regard to Interrogatory 1(a), plaintiffs, JOSEPH JUDEUS LOCHRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that the defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the 'Mafia'; individuals of low moral and character; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature."

A copy of plaintiffs' answers are Attachment 2 to this motion.

6. As a matter of Federal constitutional law and as a matter of Michigan common law, a libel plaintiff must prove not only that a complained of publication is capable of a defamatory interpretation but must also prove that the complained of publication contained false statements of fact. This is true irrespective of any determination as to the privileged nature of the complained of publication.

7. It is clear from plaintiffs' answers to defendants' Fourth Set of Interrogatories that while they claim that The Detroit News' reports are defamatory of them, they are not claiming that there is any false statement of fact in any of these reports. Accordingly, they fail to state a claim for libel, as a matter of federal constitutional law and of Michigan common law.

WHEREFORE, defendants pray that this Court enter an Order dismissing Counts I, II and III of plaintiffs' Complaint.

This motion is based on the files and records herein and upon a supporting brief and affidavit filed herewith.

Respectfully submitted,

BUTZEL LONG GUST KLEIN & VAN ZILE
a Professional Corporation
By: Richard E. Rassel (P19243)
By: (s) James E. Stewart (P23254)
By: (s) Keefe A. Brooks (P31680)
1881 First National Building
Detroit, Michigan 48226
(313) 963-8142

Dated: March 12, 1982

APPENDIX G
STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL,
Plaintiffs-Appellees,

vs.

THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM, Jointly and Severally,
Defendants-Appellants.

Court of Appeals No. 64729
Wayne Circuit Court No. 80-012-415-CZ
Hon. Susan D. Borman

APPELLANTS' BRIEF ON APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

BUTZEL LONG GUST KLEIN & VAN ZILE,
A Professional Corporation
By: Richard E. Rassel (P19243)
By: James E. Stewart (P23254)
1881 First National Building
Detroit, Michigan 48226
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Attorneys for Defendants-Appellants

Appendix G

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Appendix G

QUESTIONS PRESENTED

As a matter of law may a libel suit continue where after two years of discovery plaintiffs admit that the 10,000 plus word series of news reports sued upon contains no false statements of fact.

The Circuit Court held: Yes.

Defendants-Appellants contend that the answer is: No.

Appendix G

STATEMENT OF FACTS

Plaintiffs-Appellees, Joseph Locricchio and Gary Francell are the impressario owner/developers of the nationally famous, heavily advertised and state licensed Pine Knob Entertainment complex. Although no part of the complex bears their names, there is wide public interest in both men stemming from their development and promotion of the multitude of public entertainment, dining and recreation facilities at Pine Knob; their disputes with various public bodies over the years; their and Pine Knob's continuing financial difficulties; their association with known crime figures; and their own indictment and conviction for loan fraud. Plaintiff, Locricchio also gain publicity in the mid 70's owing to his association with the hidden crime figure investors in the scandal ridden Aladdin Hotel.

Defendants-Appellants, The Evening News Association, Pete Waldmeir, Bill Giles, Jeff Laderman, Michael F. Wendland, Jean Gadomski, Richard Willing, Robert Ankeny, and Jim Graham are editors or reporters of defendant, The Detroit News.

Since Locricchio and Francell took over the failing Pine Knob ski hill in 1970 and transformed it into an all season entertainment complex, The Detroit News has published scores of articles about Pine Knob. This lawsuit involves eleven of the news articles published between April 17, 1977 and April 25, 1979. The articles contain over 10,550 words. It is now admitted that the articles contain no false statements of fact.

THE COMPLAINT

Plaintiffs-Appellees' Complaint, Amended Complaint and Second Amended Complaint all contain Ten Counts. Count one through three of all three versions attempt to allege libel claims.[1]

[1] It is only these counts which are the subject of this appeal.

Despite the promise of specificity implicit in a twice Amended Complaint containing Ten Counts, neither the Complaint nor the Amended Complaint nor the Second Amended Complaint set forth the portions of the eleven articles which plaintiffs claim to be false and libelous.

DISCOVERY

In view of the Complaint's lack of specificity, much of the tortured history of the case has centered around appellants' continuing efforts to discover which statements in the 10,000 odd words of these articles that appellees claim to be false and thus, capable of supporting a libel claim. First, appellants moved for summary judgment under the established Michigan law that the Complaint failed to state viable libel claims because the false and defamatory statements complained of were not alleged. The Trial Judge, Judge Borman, denied this motion. Appellants then served interrogatories as to each statement in three of the news reports asking plaintiffs whether that statement was claimed to be false. Plaintiffs claimed that these interrogatories were oppressive. The trial judge agreed. Continuing the effort to determine what portions of the articles they were going to have to defend, appellants served a new set of interrogatories. The following is illustrative:

> 1. With respect to The Detroit News publication entitled "More on Mr. Tezlaff and His Curious Testiness" dated April 8, 1979:
>
> (a) Identify with particularity each and every statement you claim to be defamatory;
>
> (b) Identify with particularity each and every statement you claim contains false statements of fact;
>
> (c) For each statement identified in subpart (b) hereof, state in detail the particular fact or facts in said statement that are false;

(d) With respect to each statement identified in subpart (b) hereof, state all facts known to you and/or upon which you rely to support your claim that said fact or facts are false;

(e) With respect to each statement identified in subpart (b) hereof, state the full name, residence address, residence telephone number, present business address or employer, business or employment address and business or employment telephone number of all witnesses upon whom you rely to prove the falsity of said fact or facts and state the substance of said expected testimony of each such witness;

(f) With respect to each statement identified in subpart (b), describe with particularity each document upon which you rely to prove the falsity of said fact or facts and state the substance, contents, the present location and current custodian, of such document.

Plaintiffs sought to avoid answering these questions as well but the trial judge ordered them to answer. Their answers, when finally received, explained their reluctance to get specific:

Plaintiffs, JUDEUS LOCRICCHIO AND GARY FRANCELL, answer Defendants' Fourth Set of Interrogatories as follows:

1. In response to Interrogatory number 1 and all subparts thereto, plaintiffs JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that the submitted interrogatories pertain to the Complaint, filed on plaintiffs' behalf, against the various named defendants. Furthermore, plaintiffs have been advised that the present cause of action contains numerous

allegations based on various legal theories. The Defendants' Fourth Set of Interrogatories, by their nature and terminology, relate only to the allegations of defamation. As such, plaintiffs' response to Defendants' Fourth Set of Interrogatories are to be strictly limited and/or construed to be applicable only to the allegations of defamation.

In regard to Interrogatory 1(a), plaintiffs, JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that *the defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article,* but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia"; individuals of low moral and character; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.

In addition, defendants knowingly and purposely caused to be published derogatory information that the defendants failed to ascertain the veracity thereof, or, alternatively, caused to be published derogatory information concerning plaintiffs that defendants knew was unsubstantiated despite the facts that defendants knew and/or callously disregarded the detrimental impact that same would have on the plaintiffs and their reputation.

As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, the full portrayal implication, imputation and/or insinuatin can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other. Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes seif-evident.

(b-d) See above

(e) Plaintiffs' cause of action arises from an article(s) that appeared in 'THE DETROIT NEWS' as more fully set out in plaintiffs' Complaint. The aforesaid information, upon information and belief, resulted from research and/or investigations initiated and/or performed by the defendants, or on the defendants' behalf. At the present time, plaintiffs have been unable to depose the defendants to ascertain all individuals contacted and/or interviewed by defendants or on defendants' behalf; however, every such individuals is a potential witness to this litigation. Once discovery is completed and a determination has been made as to the individuals to be utilized as witnesses, plaintiffs will promptly inform the defendants of the same.

(f) Documents that may be utilized include any and all newspaper articles presently known to plaintiffs; any and all articles, notes memorandum, reports, "documents" and transcripts compiled by defendants or on behalf of defendants, in regard to these articles and any and all articles that are currently unknown to plaintiffs but may be uncovered through discovery. Other documents may include police reports, notes and/or memorandum which are believed to be in the possession of the appropriate

> agencies. Finally, plaintiffs may utilize any and all documents, notes, memorandum and reports that may be uncovered through discovery, or are unknown to the plaintiffs at this time.[2]

Based on these interrogatory answers, appellants again moved for summary judgment as to plaintiffs' libel claims on the ground that the reports admittedly contained no false statements, and thus appellees could not maintain an action for libel as a matter of law. In opposing this motion, appellees again admitted that each and every statement contained in the news reports was true, but claimed they could go forward because of allegedly false implications and innuendos arising from these admittedly true facts. Judge Borman denied the motion ruling the case could go forward despite the absence of falsity.

On June 1, 1982, defendants-appellants applied to this Court for Leave to Appeal from Judge Borman's ruling. On August 5, 1982, this Court granted the Application for Leave to Appeal and granted the Motion for Immediate Consideration. Defendants-appellants filed their Claim of Appeal on August 17, 1982.

ARGUMENT

It is now apparent that this is not a normal libel case brought to redress published factual misstatements. Rather, this is an action brought to squelch publication period. Plaintiffs admit that what was published contained no factual errors. What plaintiffs don't admit, but which is readily apparent is that their real complaint is that they and their activities and their notorious associations have been the subject of press coverage. They don't want press coverage period — no matter how accurate — because when confronted with the facts the public may draw conclusions

[2] Plaintiffs' answers as to the other eleven articles were identical.

which plaintiffs don't like. Therefore, to stifle further news reports and the public's right to know, plaintiffs have embarked upon this costly litigation and have been permitted to continue it in spite of their admission that the article contained no false statements.

To decide this appeal this Court does not need to plow new legal ground. It seems well settled in Michigan law that there can be no viable libel claim absent false factual statement. It is plaintiffs' burden to plead and prove falsity. Locricchio and Francell have neither pled falsity nor, based on their sworn admissions, can they prove falsity. Their libel claims should be dismissed. Only then will the public's right to be informed be restored and press obligation to inform be vindicated.

PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR LIBEL

A. As a Matter of Michigan Comon Law a Libel Claim Must be Based on False Statements.

Allegation of a false statement is a prerequisite to a libel claim. This Court has recently reaffirmed this long-standing principle of libel law in *Postill, et al.* vs. *Booth Newspapers, Inc., et al.*, _____ Mich App _____ (Docket Nos. 55959, 55990, 55996, August 23, 1982), as follows:

> "To demonstrate liability for defamation, the following elements must be proven: (a) *a false and defamatory statement concerning plaintiff;* (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher and; (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). Restatement of Torts (Second), § 558." (emphasis supplied)

This decision is consistent with repeated decisions of the Michigan courts and courts from other jurisdictions. As an initial proposition, Michigan law requires that the allegation must set forth the specific libelous words complained of; mere conclusory allegations do not suffice. In *DeGuvera* v *Sure Fit Products,* 14 Mich App 201 (1969), the plaintiff's failure to allege libelous words precluded him from stating a libel claim.

> Defendant's motion for summary judgment is filed under GCR 1963, 117.2(1) upon the ground that the amended complaint *does not allege what defamatory words* if any were used by defendant. Citing *MacGriff* v *Van Antwerp* (1950) 327 Mich 200, he claims that a libel complaint must state the alleged libelous words and their publication.
>
> * * *
>
> 'A declaration in an action for libel which fails to show where the alleged libels were published or their contents *failed to state a cause of action for libel.' Mac Griff* v *Van Antwerp, supra.*
>
> 'The law requires the very words of the libel to be set out in the declaration in order that the court or judge may judge whether they constitute a ground of action.' Gatley, *Law & Practice of Libel and Slander,* (1924 Ed) 467 (emphasis added)

The appellees have the mistaken belief that merely attaching the allegedly "defamatory articles" of some 10,000 words without alleging specific false statements is sufficient to satisfy this requirement. This misconception is the result of their confusion of two separate requirements. First, a plaintiff must prove that a publication is capable of a defamatory interpretation. For this requirement the entire publication is construed as a whole. See generally Prosser, *The Law of Torts* §111 p 739. Secondly, however, once a plaintiff surmounts the barrier of showing that the

publication as a whole is capable of defamatory interpretaion, he must show that there are false statements of fact. Whether a publication is capable of a defamatory interpretation is a threshold question to be determined by the court. Only when they have satisfied these two criteria — a defamatory content and an allegation of a false statement which was published — has a libel plaintiff stated a claim:

> With regard to what must be contained in a complaint alleging libel or slander, the following specifics are stated in 11 Callahan's Michigan Pleading & Practice (2d Ed), §78.09, pp. 256-257, as follows:
>
> 'The essentials of a cause of action for libel or slander must be stated in the complaint, *including allegations as to the particular defamatory words complained of,* the connection of the defamatory words with the plaintiff where such words are not clear or are ambiguous, and the publication of the alleged defamatory words.'
>
> A review of the complaint in the instant case shows that it does not set out the substance of the statements complained of but rather speaks in terms of conclusions. The law is well settled that the mere statement of the plaintiff's conclusions, unsupported by allegations of fact upon which they are based, will not suffice to state a cause of action. *Koebke* v *LaBuda,* 339 Mich 569 (1954). In this case, we find no error in the trial judge's granting of the motion for summary judgment. (emphasis supplied)
>
> *Pursell* v *Wolverine-Pentronix,* 44 Mich App 416, 421-22 (1973).

The requirement that a plaintiff must prove first that there is a defamatory interpretation and then must prove that there is a false statement is also recognized in Devitt and Blackmar's Jury Instructions.

The plaintiff's claim consists of six essential elements, as follows:

First, that the defendant published written statements, as opposed to oral statements;

Second, that the written statements constituted libel as that term is defined to you in these instructions;

Third, that the publication was of and concerning plaintiff;

Fourth, that the publication was communicated to third persons;

Fifth, that the publication was *false in some material particular;* and

Sixth, that the written statements were published with actual malice, as that term is explained in these instructions. [if there is a privileged publication as exists in the instant case.] [emphasis supplied]

3 Devitt and Blackmar,
Federal Jury Practice & Instructions, (3rd Ed)
§84.08 (emphasis added)

In *Orr* v *Argus-Press Co*, 586 F 2d 1108 (1978) the Sixth Circuit reversed the trial court's judgment for the plaintiff. On this case which arose under Michigan Law the plaintiff admitted that "the basic factual statements contained in the story (were) true," but contested the use of inflamatory terms such as "swindle" and "fraud" and "phony scheme." The Court initially addressed the issue of liability when an article is generally true and plaintiff's complaint has not identified any specific falsehood.

First . . . *the article is not libelous if substantially true.* 'To be true, . . . it is not essential that the libel be established in every detail as long as the article contains

> the gist of the truth as ordinarily understood . . . . Neither Orr's complaint nor the opinion of the district court identified any specific factual errors in the article . . . *Id* 1112 (Emphasis added)

By their own admissions in their response to the Fourth Set of Interrogatories, their Complaint, and their Response to Defendants' Motion for Summary Judgment, appellees do not allege any false statement of facts. Rather they allege no more than that the articles are capable of "defamatory interpretation" because of what they believe to be the "implication, imputation and insinuation of the articles." Absent the additional allegation of a false factual statement, Plaintiffs have failed to state a libel claim.

Michigan has long recognized that unless a libel plaintiff alleges *and proves* a false statement there can be no liability. *Edwards* v *Chandler,* 14 Mich 471 (1876):

> Where communication is privileged, the plaintiff can not (sic) recover without proving affirmatively *not only the falsehood of its contents,* but also that it was published with express malice. Unless he can prove both of these points, he must fail. *The falsehood being a necessary part of the case made out by the plaintiff,* the truth is but a contradiction of that case and may be made out under the general issue, . . . without resort to a special plea or notice. Upon this question there seems to be no conflict of authority, and it is in accordance with the general doctrine of pleading that the defendant may deny, under the general issue, whatever the plaintiff is obliged to prove as an essential part of his own case. *Id.* 457 (Emphasis added)

Moreover, the Michigan Supreme Court has refused to recognize a cause of action for libel when the plaintiff merely alleged that the "nature" of certain articles constituted libel but did not allege the statements in the article were indeed false. In *Sanders* v *Evening News*

Association, 313 Mich 334 (1946) the court sustained a summary judgment for defendant based on the plaintiff's inability to allege the falsity of statements in the article.

In *Sanders* Defendants published a newspaper series critical of the practice by some judges of granting overnight releases of persons arrested for misdemeanors. In an introduction to the series, the publication had stated:

> The News offers the series in a constructive effort to end the periodic feuds and scandles [sic] that result from the current system. *Id* 337

The plaintiff was a former judge. His complaint regarding one of the news reports was:

> that on the 27th day of July, 1942, the defendants hereinbefore mentioned falsely and maliciously published of the plaintiff in said article the following words: 'Something always happens to embarrass the police and restore the old telephoned request system, such as the time former Judge Joseph Sanders walked into Bethune station one night, banged his gavel on the startled sergeant's desk and shouted: ' "Court's in session, the Honorable Joseph Sanders presiding. Bring in Joe Doakes!' " *Id* 338, 339.

Plaintiff did not allege that any of the facts in these articles were not true but disputed the implications or "underlying" statements. The basis of his libel claim, like plaintiffs' in the case at bar, was that defendants were liable for the implications, inferences or innuendos arising from the articles.

> [D]efendant by the publication *meant to convey* that plaintiff was guilty of misfeasance, malfeasance and corrupt practices in the office of judge of the common pleas court, and thereby 'maliciously to injure the plaintiff, in his good name, fame, and credit, and to bring him into public scandal, infamy and disgrace, and to

> public scorn, mockery, ridicule and contempt.' *Id* 339 (Emphasis added)

Despite the plaintiff's attempt to couch his falsity requirements in innuendo or implication, the court upheld the lower court's summary judgment because, as it noted, under plaintiff's own pleadings he was not entitled to recovery.

> Our review of this record brings the conclusion that under plaintiff's own pleadings *he is not entitled to recover* in consequence of the publication of July 27, 1942. *This is because* in his amended declaration *plaintiff admits the truth of the July 27th publication* in so far as it could possibly tend to support an action for libel. *Since that publication was true, it was not libelous. Sullings* v. *Shakespeare*, 46 Mich. 408 (41 Am Rep. 166). *Id* 339, 340

Appellees have relied on other quotes from *Sanders* to justify their notion that a libelous action may be pursued by alleging that the articles "as whole" are defamatory. Once again, they have confused the requirement of alleging and proving that an article is "capable of being defamatory" and the requirement of alleging that the article contains factually false statements. It is true that in determining whether an article is capable of being defamatory, the court must construe the article as a whole, but this does not relieve appellees of their additional requirement to identify a false statement of fact in order to sustain a libel claim.

These separate requirements are clearly illustrated in *Hysko* v *Polonia Publishing Co.*, 239 Mich 676 (1972) which was concerned with the translation of published facts alleged to impute the commission of a crime. Because the article may have imputed that plaintiffs had committed a crime, the court noted that words were libelous *per se*. In instructing the jury, however, the lower court refused to grant plaintiff a directed verdict and submitted the question of falsity to the jury.

> The trial court instructed the jury that, no matter which translation was accepted, the article was libelous *per se*. He submitted to the jury Defendant's claim that the article as published, when correctly translated, was a true statement of facts detailed in it, and instructed them that, if they so found, . . . plaintiffs could not recover . . .
>
> . . .
>
> 'In a civil action for libel no damages are recoverable for a libel that contains no falsehood.' Id. 678, 680.

In other words the article may have had a defamatory interpretation and been libelous *per se* if false (that is, entitling plaintiff to recover without proving special damages) but if the underlying statements of fact were not false there could be no action for libel.

This principle was also recognized in *Van Lonkhuyzen* v. *Daily News Co.*, 195 Mich. 283 (1917). In that case, as in this case, the article complained of set forth some statements which were entirely true, but unlike this case also contained a statement which was false. The court rejected the defendant's truth defense because of the element of falsity. In so doing, however, it recognized that one cannot be held liable as consequence of a published statement which is in fact true, regardless of the inference drawn by the reader:

> "It is further urged that, because the facts upon which the libel was based were published and were true in fact, the conclusions therefrom were merely opinions of the defendant and would mislead no one. The case of *Simmons* v *Burnham*, 102 Mich. 189 (60 N.W. 476), and cases from other jurisdictions, were cited to sustain this viewpoint. In these cases, however, the facts were stated without any further comments, and *it was said that*, merely because *the truth as stated was liable to suggest damaging inferences, it did not make the state-*

ments libelous. In *Simmons* v *Burnham, supra,* the court said:

> " 'There is nothing better settled in this State than the proposition that the truth of the publication is a complete defense to the action of libel. Here, then, the defendant has simply told the truth without comment of any kind. Shall we say that, because use of the inferences which naturally follow, the meaning of the language should be extended to include the inferences? If so, it logically follows that the truth of the publication is not a complete defense in cases where inferences naturally follow the statement of certain facts. Would the character of the publication depend upon the expectation by defendant that the inference would be drawn? And would the failure of the person addressed to draw the inference relieve the defendant from liability? *We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences.*"
>
> (p 295, emphasis added)

Two other jurisdictions have held that a libel claim based totally on "false implication or innuendoes" and not on any allegations of false statements of fact do not constitute a cause of action for libel. Under the guidance of U.S. constitutional law, the Supreme Court of Louisiana in *Schaefer* v *Lynch,* 406 So 2d 185 (1981) unequivocally held that a plaintiff could not recover damages for defamation where the article was factually correct despite allegations of a false and defamatory implication. The trial court had denied a summary judgment motion on the ground that the words, even if true, might have a defamatory imputation. After the Louisiana Court of Appeals declined a writ of review, the State Supreme Court granted the writ. In ruling against the Defendant's motion, the lower court had noted that the article conveyed the impression that the plaintiff used his official position to influence lending institutions for

the benefit of his real estate investment. It also noted that an affidavit had stated that the reporter was motivated by ill-will. Despite his allegation of falsity, the plaintiff had admitted nothing was factually incorrect in the article, but that "the way people looked at the thing" he was accused of misusing state funds for his personal benefit. *Id* 188. The Louisiana Supreme Court also acknowledged that there was evidence of malice and ill-will on the part of the reporter, but nevertheless dismissed the claim.

> Malice in the sense of *New York Times* v *Sullivan* . . . requires publication of falsehoods with knowledge of their falsity or reckless disregard of their truth or falsity.
>
> The article is defamatory in the sense that it tends to diminish the public's respect for plaintiff. The defamatory meaning is insinuated. When truthful statements carry a defamatory innuendo, the implication should also be true to justify publication (cite omitted.) Nonetheless, the publication of true statements is generally encouraged even if published . . . for no good reason or for the worst possible motive. . . . The United States Supreme Court has established that there is no liability for publication of the truth about public officials regardless of motive. . . . It surely follows that all truthful statements are also constitutionally protected. *Even though a false implication may be drawn by the public, there is no redress for its servants. Where public officials and public affairs are concerned, there can be no libel by innuendo. Id* 188 (emphasis added)

It is significant to note in this case, that the Supreme Court of Louisiana based its decision on the First and Fourteenth Amendments, not the interpretation of its own state's statutes.

Plaintiffs' basis for a libel claim was also rejected by the Court of Appeals of Massachusetts in *Mihalik* v *Duprey*,

417 NE 2d 1238 (Mass App 1981), where an elected school board member made a similar argument. The Plaintiff alleged libel in a newsletter which presented a "riddle" with questions regarding the Plaintiff, such as "which elected city official doesn't live within . . . the ward from which he was elected [and] . . . is having the Trade School make furniture for him." Defendant admitted that he intended the riddle to refer to Plaintiff, but raised as his defense the truth of all statements in the riddle. The plaintiff claimed that the statements made a false implication. The Court of Appeals dismissed the case:

> Before there can be defamation of a public officer there must be a false statement of fact. . . . 'The *sine qua non* of recovery for defamation . . . is the existence of a falsehood.' . . .
>
> The Massachusetts courts, in applying the *New York Times* case, have referred in strong general terms to the requirement that an allegedly defamatory statement be shown to be false . . . 'An assertion that cannot be proved false cannot be held libelous.' . . . So long as the critic excludes false statement of fact from his arsenal, the Constitution will shield him.
>
> * * *
>
> The purposes (of not stifling discussion protected under the First Amendment) of the *New York Times* rule would not be served by permitting recovery for the statement here in issue. ***We think that their falsity . . . has not been established merely because in the aggregate they have an insinuating overtone.***
>
> *Id* 1240-1241.

Appellees claim is that there can be libel by implication. This is true only if the inference or implication *as well as the published statements* are in fact false. They have conceded that the published statements are not false. They have no claim.

The Appellees have relied on *Caldwell* v *Crowell-Collier Publishing Co*, 161 F 2d 333 (5th Cir 1947). Reliance on that case is misplaced because the case was on appeal from a dismissal on the face of the complaint. Therefore the only issue was whether the complaint stated a cause of action for libel. As has been previously discussed in addressing the issue of whether the words are actionable, that is capable of a defamatory interpretation, it is required to view the article as a whole, including any implications or innuendos arising therefrom. It was clearly in this sense that the Court defined "libel" to include false implications and innuendos. However, the court in *Caldwell* was not required to then address the issue of factual falsity of the specific statements in the complained of article. Therefore, nothing in that opinion is relevant to the narrow issue presented in this case.

Finally, appellees have previously cited *Steadman* v *Lapensohn*, 408 Mich 50 (1980). That case reversed a summary judgment for defendant because the trial judge improperly made findings of fact in ruling on the motion. That case is simply not applicable here. The plaintiffs in *Steadman* contended that defendant's articles and editorials were false and defamatory. Moreover, not only did plaintiffs allege that several of the *published statements* were false, but they supported their claim with affidavits.

B. As a Matter of Federal Constitutional Law a Libel Claim Must be Based on False Statements.

This country is perhaps unique in its long standing commitment to vigorous and uninhibited debate on public issues. In recognition of this policy, the United States Supreme Court and other courts have consistently ruled that there is no such thing as a false idea or a false opinion and that the Constitution guarantees that a publisher can be successfully sued—either civilly or criminally—only where he has published a knowingly false statement of fact. The Constitution guarantees this commitment to uninhibited and

vigorous debate and does not permit one person to hold another person liable for ideas, opinions or implications that are based on facts.

Specifically relevant to this case, the U.S. Supreme Court has held that absent showing a false statement of facts in an article, mere "ideas", pejorative terms, or inferences which may or may not be false are insufficient to establish a cause of action for libel.

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974):

> "We begin with the common ground. Under the First Amendment, there is no such thing as a false idea. However, [sic] pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of ideas." *Id* 339-340.

The court noted that although there is "no constitutional value in false statements of fact, courts must be extremely cautious in applying sanctions simply for an erroneous statement."

> "Punishment of error runs the risk of inducing a cautious and restricted exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels the publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id* 340.

The court then again noted the tension that existed between the need for a "vigorous and uninhibited press and the legitimate interest in redressing wrongful injury" to one's reputation.

> "In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure the freedom of speech and press that 'breathing space' essential to their fruitful exercise." *Id* 342.

This reasoning was applied in *Wilson* v *Scripps-Howard Broadcasting Co*, 642 F 2d 371 (6th Cir.), *cert granted*, 704 L Ed 377 (1981), where the court noted that falsity was an essential element of a libel claim. In reversing the lower court's application of state law which placed the burden of establishing the truth of the statement on the defendant, the Sixth Circuit discussed the requisite elements of a libel action.

> The Supreme Court in stating that 'demonstration that an article was true would seem to preclude finding the publisher at fault,' . . . has suggested that falsity is the element of fault in defamation cases. *Id* ____

The court was concerned with placing liability on a defendant without plaintiff ever being able to establish that the statements were indeed false.

> [A] rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations. '[W]hen the trier of fact is unable to determine the truth or falsity of a proposition of facts, he must render his decision against the party having the burden of proof. Consequently, in a jury trial the judge by allocating the burden of proof decides each issue of fact which the jury is unable to decide.'
>
> . . .
>
> The Supreme Court has said that before the status quo is changed judicially in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. *Falsity is an element of fault under the First Amendment that should be proved and not presumed. Id* ____

Appendix G

In *Orr* v *Argus Press*, 586 F 2d 1108 (6th Cir 1978), the court discussed at length when an opinion may serve as the basis for a libel action. In that case, the court found that the reporter had accurately reported the underlying facts concerning the plaintiff's indictment and arrest and that the only grounds for the libel action were defendant's words characterizing plaintiff's actions as "swindle," "fraud" and "phony schemes". The court noted approvingly that under the rule adopted by the American Law Institute in the Restatement, following the *Gertz* opinion, there can be no cause of action for the use of these words.

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegations of undisclosed defamatory facts as the basis of the opinion. . . .
>
> It is the function of the court to determine whether the expression of opinion is capable of bearing a defamatory meaning, because it may reasonably be understood to imply the assertion of undisclosed facts which justify the expressed opinion about the plaintiff or his conduct . . . Restatement (Second) of Torts, §566 (1977) *Orr* v *Argus Press*, 1114.

The court reversed the jury findings that the newspaper had acted with malice in publishing the article. First, it stated "we believe that most, if not all, the reports on Orr are substantially truthful and therefore not actionable."

> Neither Orr's complaint nor the opinion of the district court identified any specific, factual errors in the article . . . While the words 'swindle' may imply more serious wrongdoing than was involved here, the word is frequently used in colloquial speech as a substitute for 'fraud' . . . Although the word also connotes bad motive and an intent to defraud, the story as a whole sets forth

> sufficient facts concerning the circumstances of Orr's indictment and arrest for the reader to draw his own conclusions as to Orr's motives. *Id* 1112.

It is clear from this, that the Sixth Circuit held that once a reporter sets forth the facts upon which he bases his opinion or implication, or from which a reader may draw his own conclusions or inferences, there can be no cause of action for libel unless the facts are false.

The Constitution therefore recognizes that there cannot be a liability for an opinion at least as long as that opinion is based upon disclosed true facts. The same constitutional reasoning protects an implication made by a publisher or an inference drawn by a reader. If the factual reporting is not false, then the public has the information from which it may draw any number of inferences or which it may use to contest or question what it perceives as the publisher's implications. In short, if the facts are not false, the "competition of ideas" referred to in *Gertz* begins and the constitutional guarantees are intact.

CONCLUSION AND RELIEF REQUESTED

The requirement that a putative libel plaintiff set forth the specific statements he claims to be false is not simply a pleading requirement. It is one of the essential elements in our system's commitment to preserving free speech and free press.

Herein the plaintiffs have belatedly admitted that the articles sued upon contain no false statement of fact but nonetheless insist they have a right to continue their libel claims because a reader may have drawn conclusions that plaintiffs do not like. Their claims are belied by both Michigan Common Law and the United States Constitution. It is the plaintiffs' burden to plead and prove falsity as well as possible defamatory interpretation. Locricchio and Fran-

cell admit they cannot prove falsity and thus their libel claims must be dismissed. To do otherwise would permit them to continue to chill speech with costly litigation over statements not claimed to be false.

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Attorneys for Defendants

Dated: October 18, 1982

Appendix G

STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL,
Plaintiffs-Appellees,

vs.

THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM, Jointly and Severally,
Defendants-Appellants.

Court of Appeals No. 64729
Wayne Circuit Court No. 80-012-415-CZ
Hon. Susan D. Borman

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

JoAnn K. Steiner, being duly sworn, says that she is a person of suitable age and discretion to serve process, and that on the 18th day of October, 1982, she served a copy of Appellants' Brief on Appeal upon Jeremiah J. Kenney, 2000 Buhl Building, Detroit, Michigan 48226, by enclosing said copy in an envelope addressed to said attorney, sealing said envelope and depositing same, with postage thereon fully prepaid, in a United States mail receptacle located in the First National Building, Detroit, Michigan.

(s) JoAnn K. Steiner

Subscribed and sworn to before
me this 18th day of October, 1982.
(s) Loretta A. DiMarco
Notary Public, Wayne County, Michigan
My commission expires September 30, 1985

APPENDIX H

STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH JUDEUS LOCRICCHIO
and GARY FRANCELL,
Plaintiffs-Appellees,

v. Case No.

THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM, Jointly and Severally,
Defendants-Appellants.

Lower Court No. 80-012415 CZ
Court of Appeals No. 64729

APPLICATION FOR LEAVE TO APPEAL

Pursuant to GCR 1963, 853.1, defendants apply to this court for leave to appeal from the decision of the Court of Appeals dated August 24, 1983 as to which the Court of Appeals denied rehearing on October 24, 1983.

I.

CONCISE STATEMENT OF PROCEEDINGS AND FACTS

1. The Evening News Association publishes The Detroit News. Defendant Giles was the Editor and Vice-President of The Detroit News. The remaining defendants are reporters, staff writers and columnists for The Detroit News.

2. Plaintiffs, along with several businesses and corporations which they control, are the developers and primary operators of the nationally famous Pine Knob Entertainment Complex. During the course of their public careers, the plaintiffs have been investigated by the United States Justice Department, associated with and done business with convicted felon and racketeer James Tamer, subpoenaed to testify to at least one federal grand jury concerning that Aladdin Hotel in Las Vegas, and indicted by a United States Organized Crime Strike Force Grand Jury and pled guilty to lesser charges in that indictment.

3. As the plaintiffs were developing Pine Knob, the News Defendants and other media reported on criminal proceedings involving these plaintiffs, their efforts and attempts to find financing for Pine Knob, their involvement with the Aladdin Hotel in Las Vegas, and their business and personal associations with convicted felons and identified organized crime figures.

4. On April 3, 1980, the plaintiffs filed suit based on eleven of these Detroit News' reports, which were published over a period ranging from April 27, 1977 through April 25, 1979, and containing over 10,550 words. The news reports were attached to plaintiffs' Complaint. An Amended Complaint was filed on or about March 17, 1982. The original Complaint and the Amended Complaint alleged that the news reports complained of charged plaintiffs with criminal conduct or conduct of an immoral or reprehensible nature. Neither the original Complaint nor the Amended Complaint set forth the statements in the eleven News' reports upon which plaintiffs base their ten-count Complaint.

5. Counts One through Three of Plaintiffs' First Amended Complaint are libel claims against all the News Defendants, and it is only these claims which are the subject of this Application for Leave to Appeal. The remaining claims are dependent on the libel claims.

6. Throughout the entire course of the proceedings in the trial court, defendants made repeated efforts to discover what statements, if any, in these publications plaintiffs claim to be false. Specifically, defendants initially moved for summary judgment *inter alia* on the ground that plaintiffs' original Complaint failed as required by Michigan defamation law to set forth the falsified defamatory statements complained of. The Wayne County Circuit Court, the Honorable, Susan D. Borman denied this motion. Defendants then filed three sets of Interrogatories requesting that as to each statement in three of the complained of news reports, plaintiffs answer whether that statement was claimed to be false. Judge Borman ruled that such Interrogatories were not permissible. Finally, defendants filed a Fourth Set of Interrogatories requesting plaintiffs to identify which statements they contended were false statements of fact.

7. After plaintiffs' objections to this Fourth Set of Interrogatories were denied by Judge Borman, plaintiffs answered that they did not base their libel claims on any false statement of fact in the ten thousand plus words contained in The Detroit News' publications. Rather, plaintiffs answered that they based their libel claims on the allegedly false portrayal, implications, imputations or insinuations allegedly arising from the admittedly true statements. Their exact answer read in relevant part as follows:

> In regard to Interrogatory 1(a), plaintiffs Joseph Judeus Locricchio and Gary Francell, state that they have been advised by their attorneys that the defamation allegations contained in said Complaint *are not necessarily based on a false statement(s)* in any one particular article, but rather, that the entire series of articles as the same represented a false *portrayal, implication, imputation* and/or *insinuation* that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise

known as the "Mafia"; individuals knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature. (emphasis added)

8. Based on plaintiffs' responses to the Fourth Set of Interrogatories, defendants moved for summary judgment as to the libel claims on the ground that there was no issue of any material fact that the statements complained of were true, and thus plaintiffs could not maintain an action for libel as a matter of law.

9. Plaintiffs resisted this summary judgment motion on the ground that the allegedly false implications and innuendos arising from the publications in question would support their libel claims, although they were not alleging the falsity of any of the underlying statements of fact.

10. Judge Borman, ruled for plaintiffs and denied defendants' Motion for Summary Judgment.

11. By its Order of August 5, 1982, the Court of Appeals granted defendants' Application for Leave to Appeal to that Court and heard oral arguments. By its Order dated August 24, 1983, the Court of Appeals denied defendants' appeal and by Order of October 24, 1983, denied defendants' Motion for Rehearing. It is from the Order of the Court of Appeals denying defendants' appeal and that defendants seek leave to appeal to this court.

II.

THE REASONS FOR THIS COURT TO HEAR THIS APPEAL NOW

1. The effect of this decision of the Court of Appeals extends well beyond this libel action against The Detroit

News. Its affects the free speech rights of every citizen of Michigan. It says that every speaker on every subject is responsible in libel for every innuendo, implication and insinuation any listener might attach to his speech EVEN THOUGH THE SPEAKER PUBLISHED NOTHING BUT TRUE AND ACCURATE FACTS. The decision of the Court of Appeals is clearly erroneous. It chills the speech rights of every citizen of this State and patently involves legal principles of major significance to the jurisprudence of the State.

2. The decision of the Court of Appeals holding that a plaintiff may maintain a libel action after conceding that no factual statement published by defendant was false is contrary to this Court's repeated and unanimous decisions and is contrary to the Standard Jury Instructions for Libel recently adopted by this Court's Committee for Standard Jury Instructions.

3. The decision of the Court of Appeals permitting plaintiff to continue a libel action asserting claims not over what was published but rather over unpublished but claimed false implication, insinuation, innuendo and inference deprives the citizens of this state of their guaranteed Constitutional Speech Rights.

4. The citizens of this state as well as the defendants in this case will suffer harm by being required to await final judgment because in the interim this decision will severely chill Constitutionally guaranteed Free Speech in the state by subjecting the publishers of true and accurate facts to libel suits based on unpublished but claimed erroneous implications arising from the published facts.

WHEREFORE, defendants respectfully request that this court grant its Application for Leave to Appeal.

Appendix H

This application is based on the files and records herein and the a supporting brief filed herewith.

Respectfully submitted,

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Attorneys for Defendants

Dated: November 14, 1983

Appendix H

STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH JUDEUS LOCRICCHIO
and GARY FRANCELL,
Plaintiffs-Appellees,

v. Case No.

THE EVENING NEWS ASSOCIATION,
INC., a Michigan corporation,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
ROBERT ANKENY and JIM GRAHAM,
Jointly and Severally,
Defendants-Appellants.

Lower Court No. 80-012415 CZ
Court of Appeals No. 64729

BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL

BUTZEL LONG GUST KLEIN § VAN ZILE
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Appendix H

QUESTION PRESENTED

AS A MATTER OF LAW, MAY A LIBEL SUIT CONTINUE WHERE AFTER TWO YEARS OF DISCOVERY PLAINTIFFS ADMIT THAT THE 10,000 PLUS WORD SERIES OF NEWS REPORTS SUED UPON CONTAINS NO FALSE STATEMENTS OF FACT?

The Court of Appeals held: "YES."

Defendants-Appellants contend that the answer is: "NO."

Appendix H

CONCISE STATEMENT OF FACTS

The facts pertinent to this case and this brief are set forth in the accompanying Application under the title "Concise Statement of Material Facts and Proceedings".

ARGUMENT

INTRODUCTION

The Court of Appeals' decision which defendants seek to have this Court review holds that any citizen who publishes only true and accurate facts will be responsible in a libel action for any conclusions which any reader or listener draws from those true and accurate facts. Put another way, the Court of Appeals' decision holds that the right of free speech in this state does not protect citizens who publish only true facts. This Court's help is needed immediately to preserve the right of free speech in this state.

The Court of Appeals' decision relates to a libel involving news reports containing more than 10,000 words published by The Detroit News. Plaintiffs concede the news reports to be factually accurate.[1] Rather, than attacking the facts reported, plaintiffs seek to and have been permitted to proceed with respect to unpublished implications which they claim arise from the facts reported and which they find objectionable.

Moreover, in the recently filed Plaintiffs' Response In Opposition To Defendants' Motion For Rehearing at page 11, plaintiffs state, "Proofs of the false nature of the implications . . . will be submitted at trial." With the Court of

[1] For example, they do not claim that they were not indicted by a United States Organized Crime Strike Force Grand Jury or that they later pled guilty to a lesser charge; they do not deny close association with convicted felon and racketeer James Tamer; they do not deny that they took a $200,000 cash loan from one William Magill to Toronto to hide Magills participation in their financing nor do they deny that Magill's sister-in-law/bookkeeper was murdered shortly thereafter.

Appeals' blessing, there is to be an extended trial, not over facts published by The Detroit News, but over what the plaintiffs claim those facts might be interpreted to mean. Further, The Detroit News is not to be told what the claimed false implications are until the trial.

To say the least, these propositions have a direct, chilling effect on the First Amendment rights of The Detroit News. However, the decision's threat to fundamental First Amendment rights extends much further and cuts much deeper than this case or these parties. Until this decision is corrected, citizens of this state cannot write or say anything and be secure in the belief that as long as they have limited themselves to true and accurate facts they cannot be sued. Until this decision is corrected, any citizen of this state who does print or speak only true and accurate facts is liable to suit over whatever meaning anyone else might attribute to those true facts.

Certainly any citizen can and should be held responsible for the accuracy of the factual material it publishes—be it a manager discussing a subordinate's job performance; a parent discussing a teacher's classroom conduct; or a newspaper reporting on financial transactions, criminal convictions and business associations of a major commercial entity in this state. However, these citizens cannot be held responsible for the unknown implications, inferences or innuendos which different listeners might draw from these accurate facts. To hold citizens responsible for such implications, inferences or innuendos is to hold them responsible not for what they have said, but for what some other person thinks that these accurate facts mean. Such a notion violates guaranteed First Amendment rights and violates fundamental notions of fairness. Unfortunately this is exactly what the Court of Appeals' opinion permits. Every citizen of this state who seeks to exercise his right of free speech is chilled by this decision. Review of this chilling decision cannot and should not await the conclusion of the

trial in this case and yet another trip through the appellate courts. The fundamental error made by the Court of Appeals will infect not only the trial in this case but in other cases as well. Worse, legitimate speech will be silenced out of fear over suits relating solely to unpublished implications.

This Court of Appeals decision is wrong as a matter of Michigan law. It is contrary to long-established and unanimous decisions of this Court requiring that a plaintiff prove not only that the publication was defamatory, i.e. tended to harm the plaintiff's reputation, but also that the publication contained false statements of fact. This law has been reaffirmed in the recent adoption by this Court's Committee on Standard Civil Jury Instruction of standard jury instructions for libel actions.

Additionally the Court of Appeals' decision is wrong as a matter of federal constitutional law. It effectively destroys guaranteed First Amendment rights in this state. First, by not requiring that a libel plaintiff prove factual falsity, the Court of Appeals' decision deprives citizens of this state of their guaranteed First Amendment rights. As a matter of United States Constitutional Law, a statement that is not false may not be the basis of a libel suit. Furthermore, the United States Supreme Court has specifically ruled in *Gertz* v *Robert Welch, Inc,* 418 US 323, 339-40 (1974) that "Under the First Amendment there is no such thing as a false idea." Therefore, since implications, inferences and innuendos are at most ideas or unexpressed opinions, no plaintiff can meet his constitutional burden of falsity by claims of such false "ideas."

The second way in which the Court of Appeals' opinion destroys guaranteed First Amendment rights in this state is illustrated by the constitutional protection for expressions of opinion. Federal constitutional law requires that an opinion, no matter how defamatory that opinion may be, is not actionable if based upon disclosed facts that are true. Cer-

tainly, then, a defendant who limits himself to publication of true facts but states no opinion based on these facts cannot be liable for implications, inferences and innuendos, no matter how damaging, which a reader (or the plaintiffs) might draw from those true facts. In other words, even if The Detroit News had actually expressed as written opinions the very implications, inferences and innuendos claimed by plaintiffs, there would be no liability as a matter of federal constitutional law.

THE UNCONTRADICTED MICHIGAN LAW

There is not a single case of Michigan common law that has permitted a plaintiff to recover in libel action in which the published facts were conceded to be true no matter what implication or inference or innuendo the plaintiff claimed that the true facts might have. A close reading of *Sanders* v *Evening News Association*, 313 Mich 334 (1946), illustrates this very point.

In that case, defendants published a newspaper series critical of the practice by some judges of granting overnight releases of persons arrested for misdemeanors. In an introduction to the series, the publication had stated:

> "The News offers the series in a constructive effort to end the periodic feuds and scandals that result from the current system."
>
> (p 337)

The plaintiff was a former judge. His complaint regarding one of the news reports was:

> "that on the 27th day of July, 1942, the defendants hereinbefore mentioned falsely and maliciously published of the plaintiff in said article the following words: 'Something always happens to embarrass the police and restore the old telephoned request system, such as the

time former Judge Joseph Sanders walked into Bethune station one night, banged his gavel on the startled sergeant's desk and shouted: ' "Court's in session, the Honorable Joseph Sanders presiding. Bring in Joe Doakes!" ' "

(pp 338-339)

Plaintiff did not allege that any fact in this article was false but disputed the implications or "underlying" statements that he was somehow acting improperly. The basis of his libel claim, like plaintiffs' in the case at bar, was that defendants were liable for the implications, inferences or innuendos arising from the true facts. He stated his claim as follows:

"[D]efendant by the publication *meant to convey* that plaintiff was guilty of misfeasance, malfeasance and corrupt practices in the office of judge of the common pleas court, and thereby 'maliciously to injure the plaintiff, in his good name, fame, and credit, and to bring him into public scandal, infamy and disgrace, and to public scorn, mockery, ridicule and contempt.' "

(p 339, emphasis added)

Despite the plaintiff's attempt to couch his falsity requirements in innuendo or implication, the court upheld the lower court's summary judgment because, as it noted, under plaintiff's own pleadings he was not entitled to recovery.

"Our review of this record brings the conclusion that under plaintiff's own pleadings he is not entitled to recover in consequence of the publication of July 27, 1942. This is because in his amended declaration plaintiff admits the truth of the July 27th publication in so far as it could possibly tend to support an action for libel.

Since that publication was true, it was not libelous. Sullings v. *Shakespeare*, 46 Mich. 408 (41 Am Rep. 166)."

(pp 339, 340)

Put very simply the plaintiff in *Sanders* had held court as reported in the Detroit News. He therefore had no libel claim no matter what implication, inference or innuendo could be drawn from that fact.

In its decision, the Court of Appeals relies on the statement by the *Sanders* court that " 'To test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.' " This is certainly correct insofar as when assessing the defamatory nature of a publication, i.e. did it tend to lessen the plaintiff's reputation, the Court should consider the publication as a whole including any inference or implications or innuendo. The plaintiff in *Sanders was over this hurdle by his allegation that the publication as a whole meant to convey that he was guilty of misfeasance and malfeasance in office*. Certainly the implication, inference or innuendo of a report that a judge was holding court in the police station for certain favored people was one that could have an implication, inference or innuendo indicating that he was guilty of some misfeasance or malfeasance or corrupt practice and would tend to harm his reputation. By the same token, a report on the factual activities of the developers of the Pine Knob Complex might well lead to an implication, inference or innuendo that they were somehow connected with organized crime. Nevertheless, just as the judge-plaintiff in *Sanders* could not recover no matter what the implication, inference or innuendo because he conceded that the underlying facts (i.e. that he had held court as reported) were true, these plaintiffs likewise cannot recover because they have conceded that there is no false statement of fact in The Detroit News reporting.

Appendix H

In *Simons* v *Burnham*, 102 Mich 189 (1894), the plaintiff and defendant were rival merchants in Lansing. The basis for plaintiff's libel action was succinctly stated by the Supreme Court as follows:

> "[I]n October, 1889, the defendant sent to various firms in other cities, with whom the plaintiff had business relations, clippings from a Lansing paper, showing real-estate transfers, including between ink lines, placed there by himself, the following: 'Benjamin F. Simons to Adeline A. Simons, lots 1, 2, and 3, block 150, Lansing, $5,000.' This clipping was attached to a half sheet of paper, on which was written the following, viz. (after the above quotation from the clipping, the words, 'his wife,' and: 'The real estate transferred and marked in slip is estimated to be worth at least $10,000; other real estate heavily mortgaged; reported to be heavily indebted to three of four banks, for borrowed money, at a high rate of interest, say 8 to 10 per cent. per annum, and payable every 60 days.' In one instance it is claimed that to a clipping of the kind mentioned, inclosed by ink lines as aforesaid, the following pencil writing was appended, viz.: 'In time of peace, prepare for war.' "
>
> (p 191)

Although the plaintiff conceded that the facts published by defendant were true, he alleged that he should be permitted to continue his libel action because the implication, inference and innuendo of these true facts was "that the said plaintiff was fraudulently conveying his property to his wife, and was insolvent, and in failing circumstances, and unreliable, and unworthy of credit" (p 192). This Court recognized this claim that "The innuendo charges defendant with meaning that plaintiff was fraudulently disposing of his property, was in failing circumstances, and unworthy of credit." (p 193). Certainly the publication of these true facts could lead to that implication, inference or innuendo. Nevertheless, this Court ruled that in those publications in

which defendant reported only on concededly true facts, there could be no liability for defamation no matter what implication, inference or innuendo might have been drawn from those true facts. Indeed, it was only the publication to which defendant added the warning "In time of peace, prepare for war" that the Supreme Court would have permitted to go to the jury.

> "There is nothing better settled in this State than the proposition that the truth of the publication is a complete defense to the action of libel. Here, then, the defendant has simply told the truth without comment of any kind. Shall we say that, because of the inferences which naturally follow, the meaning of the language should be extended to include the inferences? If so, it logically follows that the truth of the publication is not a complete defense in cases where inferences naturally follow the statement of certain facts. Would the character of the publication depend upon the expectation by defendant that the inference would be drawn? And would the failure of the person addressed to draw the inference relieve the defendant from liability? We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences (Townsh. Sland. & L. § 133), though we must recognize a distinction between inferences which are the natural result of implications contained in the language of the publication—which may, in a sense, render it ambiguous, and justify a construction at variance with the strict meaning of the words as ordinarily used—and inferences drawn only from the facts themselves. In the former case the action may lie, — not because of the inference, but by reason of the implication; in the latter it will not. Applying this rule to the case before us, we feel constrained to say that these words are not susceptible of the construction alleged in the innuendo.

From what has been said, the third count should be excepted. In that count the charge consisted of the real-estate transfer, followed by the words, 'In time of peace, prepare for war.' The statement of the paper was true as to the transfer. If the writing was libelous, it must be by reason of the use of the words, 'In time of peace, prepare for war.' The natural meaning of this will depend largely on the circumstances under which the words were written, and, unless we can say that they do not contain an intimation that the plaintiff was in failing circumstances or unworthy of credit, it was proper to leave this question to the jury."

(pp 197-198)

In *Van Lonkhuyzen* v *Daily News Co.*, 195 Mich 283 (1917) this Court reiterated its position from *Simons* that as long as a publisher limits himself to true facts, he is not liable for the implications, inferences and innuendoes from those true facts. In *Von Lonkhuyzen* the plaintiff was a German minister in Grand Rapids who, in the years just prior to American involvement in World War I, published in his church newspaper several articles and a letter he had sent to President Woodrow Wilson all critical of U. S. foreign policy toward Germany. In response, the Daily News Company published an article critical of plaintiff in which it accurately reported plaintiff's actions, and that he was not an American citizen and had not even applied for naturalization papers. The defendant's article concluded by referring to plaintiff as "an interloper, a meddler and a spreader of distrust, discontent and sedition". This language was the basis of the plaintiff's libel action against the Daily News Company. (p 292) This Court held that had the Daily News Company reported only the true facts and left any inferences as to plaintiff's loyalty or sedition or lack thereof to be drawn by the reader, the case would not have been permitted to go to the jury.

"It is further urged that, because the facts upon which the libel was based were published and were true in fact, the conclusions therefrom were merely opinions of the defendant and would mislead no one. The case of *Simons* v. *Burnham*, 102 Mich. 189 (60 N. W. 476), and cases from other jurisdictions, were cited to sustain this viewpoint. In these cases, however, the facts were stated without any further comments, and it was said that, merely because the truth as stated was liable to suggest damaging inferences, it did not make the statements libelous. In *Simons* v. *Burnham, supra*, the court said:

> " 'There is nothing better settled in this State than the proposition that the truth of the publication is a complete defense to the action of libel. Here, then, the defendant has simply told the truth without comment of any kind. Shall we say that, because of the inferences which naturally follow, the meaning of the language should be extended to include the inferences? If so, it logically follows that the truth of the publication is not a complete defense in cases where inferences naturally follow the statement of certain facts. Would the character of the publication depend upon the expectation by defendant that the inference would be drawn? And would the failure of the person addressed to draw the inference relieve the defendant from liability? We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences.'

"In the case before us, the publishers were not satisfied to state the facts and allow the readers to draw their own conclusions, but followed it up by making the libelous statement for the very purpose, as admitted, to hold him up to scorn and ridicule. While the question of whether or not the limits of fair criticism have been transcended may sometimes be a question of law, ordi-

narily it is a question of fact for the jury, and we are satisfied that under all the facts and circumstances of this case the question of justification became one of fact for the jury to determine."

(pp 295-296)

In *Kenney* v *Hatfield*, 351 Mich 498 (1958), the plaintiff was a person whom defendant, a probate court judge, had committed to a mental institution. This commitment later became an issue when defendant ran for circuit judge. The defendant published his version of this commitment in a political advertisement stating that he had committed plaintiff because "numerous complaints were said to be on file against Kenney in the Benton Harbor Police Department indicating that he had been frightening women . . . ." (p 501). The plaintiff's libel action followed. The Supreme Court conceded that this statement was libelous per se in that it imputed impairment of mental facilities. (p 512) However, this Court ruled that because the statements were in fact true, the plaintiff had not stated a claim for defamation even though he claimed that these true facts somehow implied that he had acted illegally and improperly.

"This record discloses no denial by the plaintiff of the conduct recited in these complaints [on file with the police]. On the other hand, it does disclose plaintiff's legal argument which assumes the truth of the facts disclosed therein, vigorously disclaiming that the conduct referred to in the complaints was illegal or that it demonstrated any improper motive on the part of plaintiff."

(p 511)

* * *

"We believe that the record in this case at the close of plaintiff's proofs contained ample evidence to justify

his dismissal of the cause of action as to all defendants on the grounds that the factual allegations were true, . . ."

(p 514)

The opinions of this Court cited above consistently have required plaintiffs to prove that published factual statements are false. These plaintiffs have attempted to disguise their inability to identify false factual statements in the complained of publications by defining the word "statement" in a curious fashion. For example, in their Brief In Support Of Plaintiffs' Response In Opposition To Defendants' Motion For Rehearing at page 3, they state:

"[D]efendants continue to ignore the common usage of the word 'statement', communication creating an impression . . ."

Just as plaintiffs would attempt to create liability for true and accurate publications by creating their own "implications" and "insinuations" they now create their own "common" definitions of the word "statement." The word "statement" has a more concrete meaning than that. *Black's Law Dictionary* 1263 (Rev. 5th Ed. 1979) defines "statement" as:

"In a general sense, an allegation; a declaration of matters of fact."

It is the truth or falsity of the "declaration of matters of fact" that the publications of defendants must be judged by, not the "impressions" of the plaintiffs.

In its recent decision in *Postill* v *Booth Newspapers*, 118 Mich App 608, 618 (1982), the Court of Appeals adopted the Restatement requirement that a plaintiff must prove that a complained of publication is false *and* defamatory. The fact that the communication tends to harm

the plaintiff's reputation proves only that it was defamatory. [See Restatement, Torts (Second), §559.] The plaintiff still must prove falsity.

Most recently, the Court of Appeals again reaffirmed the requirement of proving falsity in its decision in *Gaynes* v *Allen*, ____ Mich App ____ (No. 61172, August 16, 1983). In this case an optometrist had brought a libel action over an article in a non-profit newsletter published by ophthalmologists entitled "Michigan Oral Surgeon—'A Horrible Price to Pay for Someone's Incompetence.' " The article criticized the optometrist's handling of a vision problem for an oral surgeon who had claimed to have lost his vision as a result of the optometrist's actions. While the title of the article itself was certainly capable of a defamatory interpretation and could have supported an implication, inference or innuendo of incompetence on the part of the optometrist, the Court ruled as follows:

> "Thus, we hold that a private individual who seeks recovery from a media defendant for defamatory falsehoods which relate to a matter of legitimate public concern may not recover without proof that the defendant published the statements with knowledge of their falsity or with reckless disregard for their truth or falsity.

The Court's holding was specifically based upon the Restatement:

> "Our holding is consistent with the view of the American Law Institute:
>
> " '* * * [O]ne who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he
>
> " '(a) knows the matter to be false, or
>
> " '(b) acts in reckless disregard as to its truth or falsity.' Restatement Torts (Second), §600.

"In the absence of an occasion giving rise to a privilege, the Institute proposes that one be liable for publication of false and defamatory communications concerning a private person if he or she acts with knowledge of the statement's falsity and of its defamatory character, in reckless disregard of those matters, or *negligently* in failing to ascertain them. Restatement Torts (Second), §580B.

"We restrict our holding to the facts presented, and express no opinion concerning non-media defendants or purely private defamation."

(Slip Opinion, p 7)

Obviously, for a statement to be published with knowledge of falsity or reckless disregard of falsity, that statement must be false in the first instance. In this case, the plaintiffs have conceded that there are no false statements of fact and therefore they will be unable, by their own admission, to ever prove publication of any statements with knowlege of falsity of those statements.[2]

What *Gaynes* shows is that if we depart from the requirement that a plaintiff must prove false facts, all the plaintiff need prove is that defendant did not believe true some implication, inference or innuendo which some other person attributed to the publication. The decision in *Gaynes* and the decision of the Court of Appeals in this case are irreconcilable.

---

[2] While the *Postill* and *Gaynes* decisions both arose in other than Summary Judgment contexts their applicability to the issues involved in the instant matter is clear. Both, as noted above, distinctly require that as a threshold element to recover the libel Plaintiff must prove the falsity of complained of statement. That issue is the crux of the dispute before the Court where Plaintiffs do not challenge the accuracy of the published statements, but seek to recover on the basis of alleged implications from those true statements.

Appendix H

Michigan has never had Standard Jury Instructions covering libel and slander. This was remedied in August when this Court's Committee on Standard Civil Jury Instructions adopted such instructions for libel and slander. Obviously, the question now presented to this Court does not involve a dispute over a jury charge; however, these adopted instructions are particularly relevant to this case in their definition of libel and in their statement of the plaintiff's burden of proof.

"SJI2d 118.01 Libel: Definition

"Libel is a statement *(of fact) which is false in some material respect and is communicated to a third person by (printing/writing/signs/pictures) and has a tendency to harm a person's reputation.[3]

* * *

"SJI2d 118.05 Libel, Slander: Burden of Proof

"Plaintiff has the burden of proving that:

"a) defendant made the statement *(of fact) complained of to a third person by (printing/writing/sign/pictures/words/gestures), and

"**b) the statement was of and concerning the plaintiff, and

"c) the statement was false in some material respect, and the statement had a tendency to harm the plaintiff's reputation, and

[3] The Note on use provides that the parenthetical should not be used when there is a claim based upon a mixture of opinion and fact. Because there can be no false opinion when based upon true facts, the only instance where the parenthetical would not be used would be where plaintiffs claim that an opinion is actionable because it is based upon false facts. Herein the plaintiffs are claiming false implication, inference and innuendo based upon true facts.

"***d) as a result of the statement, plaintiff suffered some damage, and

"e) (insert SJI2d 118.06 and/or SJI2d 118.07 if applicable.)

"Your verdict will be for the plaintiff if you decide that all of these have been proved.

"Your verdict will be for the defendant if you decide that any one of these has not been proved.

The Notes on Use for section 118.05 are not applicable to plaintiffs' claims in this case. Rather, their claims are based upon what they claim to be the implication, inference and innuendo from statements of fact by The Detroit News. Therefore, the Michigan Civil Jury Instructions are clear that to find libel at all, there must be a "*statement of fact which is false*." The instructions are likewise clear that plaintiff must prove that the defendant made "*the statement of fact* complained of" and that "*the statement was false in some material respect*, and the statement had a tendency to harm the plaintiff's reputation."

These plaintiffs fail on both counts. They have conceded that they are not basing their claim on any false statement of fact but upon what they perceive to be the implication, inference or innuendo of those concededly true facts. Therefore what they are claiming does not constitute libel as defined in Michigan. Additionally, it is clear that the plaintiffs will not be able to carry their burden of proof as required by the Michigan Jury Instructions because they have conceded that there was no statement of fact which was false in any material respect.

Appendix H

THE NON-MICHIGAN AUTHORITY CITED IN THE COURT OF APPEALS' DECISION IS INAPPLICABLE TO THIS STATE'S LAW OR TO THIS CASE

The Court of Appeals' Opinion relied upon two cases from other jurisdictions; *Memphis Publishing Co* v *Nichols*, 569 SW2d 412 (Tenn 1978) applying Tennessee law and *Caldwell* v *Crowell-Collier Publishing Co.*, 161 F2d 133 (5th Cir 1947) applying Florida law. Defendants respectfully submit that reliance on these cases is misplaced herein for several reasons. Both cases are at odds with the uniform Michigan law discussed above; both cases involved publications which contained false statements of fact; and *Nichols* has been overruled. A brief discussion of both cases is essential.

In *Nichols*, the Memphis Press reported that a woman had shot plaintiff Ruth Nichols along with the suspect's husband at Ruth Nichols' home and that "the incident took place Thursday night after the suspect arrived at the Nichols home and found her husband there with Mrs. Nichols." (p 414). The plaintiff claimed that the implication, inference or innuendo of the article was that she was having an adulterous affair with the suspect's husband. The newspaper claimed that even if the article could have suggested that the plaintiff had not proven falsity because all of the reported facts were true. (p 420).

A close reading of the case shows that there were serious misstatements of fact in the newspaper article. For example, the incident had taken place in the afternoon and not "Thursday night" as reported, and the suspect did not go to the Nichols home and "find her husband there with Mrs. Nichols" as reported but had found a group of neighbors including her husband and Mr. Nichols talking in the living room of the Nichols home. (p 414). Therefore, there was factual falsity in that case. Moreover, the Tennessee court based its ruling on the unique proposition of Tennessee law that a plaintiff "need not show that a state-

ment is false" as long as he shows it was defamatory, i.e. had a tendency to harm his reputation. (p 420). This is directly contrary to Michigan's long-standing requirement that a plaintiff must prove not only a defamatory impact i.e. a tendency to harm his reputation but must also prove false statements of fact. Furthermore, the Sixth Circuit, in *Wilson* v *Scripps-Howard Broadcasting Co.*, 642 F2d 371 (6th Cir 1981), has specifically held that this proposition of Tennessee law relied upon in *Nichols* is unconstitutional. The Sixth Circuit discussed *Nichols*, found it constitutionally deficient, and held that it is unconstitutional to permit a plaintiff to recover without proof of factual falsity. (pp 374-376).[4] In sum, *Nichols* has no validity; even before it was overruled, it was totally opposite of Michigan law; and there were false facts in the complained of report. It has no bearing on this case.

Caldwell v *Crowell-Collier Publishing Company*, 161 F2d 333 (5th Cir 1947) involved a Colliers Magazine editorial comparing the treatment of black prisoners in North Carolina and Florida. In this editorial, Colliers referred to a recent incident in which a black prisoner under indictment for rape was "snatched from jail by a mob and shot to death." (p 334) The magazine reported Florida Governor Caldwell as having publicly stated that "he did not consider this a lynching" and that "the mob had saved the courts, etc., considerable trouble." (p 334) The Governor's libel action followed. There are several significant points. First, and as in *Nichols*, there were allegations of factual falsity.

> "Further allegations are that it was not true that the negro was snatched from jail by a mob; that the statement the Governor said he did not consider this a lynching was a distortion, imputing that the Governor

[4] The Court of Appeals' opinion therefore relies on a case that has been overruled as a matter of constitutional law. Such reliance is tantamount to reliance on a Tennessee state case decided before *Miranda* v *Arizona*, 384 US 436 (1966) holding that a criminal defendant's confession may be used against him even though he was never so warned.

did not disapprove the killing, while what he said was that it was murder, and not a lynching because there was no evidence of mob action; and that he 'opined the mob had saved the courts considerable trouble' was wholly untrue; . . ."

(p 334)

Furthermore, having had advance notice of the Colliers' editorial, Governor Caldwell had "telegraphed the publisher, the editor, and the managing editor, calling attention to the false statements *and* inferences in the editorial. . . ." (p 335) In short, the Governor alleged *factual falsity* of the most compelling nature, i.e. that he had not said what Colliers had quoted him as saying. There is no such allegation in this case.

The holding of *Caldwell* is consistent with the fact that plaintiff had alleged factual falsity.

> "A jury might well conclude that the Governor was being held up as unfaithful to his office by reason of facts falsely stated *and* implied in the editorial."
>
> (p 336)

Note that the Court specifically used the conjunctive "and" rather than the disjunctive "or". *Caldwell* clearly would not permit recovery based solely upon false implication, inference or innuendo. In this case, there are no allegations of "facts falsely stated" as in *Caldwell*. Rather, these plaintiffs have claimed they should be able to continue a libel action for "facts truthfully stated" because those facts suggest to them an implication, inference or innuendo which they do not like. *Caldwell* is inapplicable.

Finally, the Court of Appeals decision relied on 50 Am Jur 2d, Libel and Slander §13, pp 528-529 and *Prosser, Torts* (4th Ed 1971) § 111 in support of its opinion. Both of these cited authorities deal only with the question of whether a publication is defamatory, i.e. has a tendency to

harm the plaintiff's reputation. Certainly for that limited inquiry a court properly looks to the publication as a whole as well as to any implication or innuendo contained therein. Having resolved that inquiry in favor of the plaintiff, the Court must then look to determine whether or not there are any false statements of fact. See especially in this regard the Michigan Standard Jury Instructions definition at SJI2d 118.01 of libel as including false facts *and* a tendency to harm a person's reputation and the burden of proof at SJI2d 118.05 requiring that the plaintiff prove publication of statements which are factually false *and* which have a tendency to harm plaintiff's reputation. In this case, the plaintiffs have alleged only one of those elements — that the innuendo, inference and implication of The Detroit News' reports had a tendency to harm their reputation. They have not even alleged the second requirement of factual falsity and have admitted in their interrogatory answers that there are no false statements of fact.

IT IS AN UNCONSTITUTIONAL INFRINGEMENT ON FIRST AMENDMENT FREEDOMS FOR A PUBLISHER TO BE HELD LIABLE FOR DEFAMATION WITHOUT ALLEGATION AND PROOF OF FACTUAL FALSITY

The upshot of the Court of Appeals' Opinion is that a publisher may be held liable for defamation even though he has published no false statements of fact. Defendants respectfully submit that not only is this result contrary to Michigan law but that such a result is blatantly unconstitutional.

The Court of Appeals' opinion deprives the Detroit News of its guaranteed First Amendment rights by not requiring that plaintiffs prove factual falsity. In *Wilson* v *Scripps-Howard Publishing Company*, referred to at p 16 above and at pp 17-18 of defendants' main brief on appeal, the Sixth Circuit Court of Appeals specifically disapproved of the *Memphis Publishing Co.* v *Nichols* holding that proof

of falsity is not required. To the extent *Wilson* overrules *Nichols* on constitutional grounds it overrules this Court's opinion on constitutional grounds. Moreover, as a matter of federal constitutional law there can be no such thing as a false idea. Therefore, plaintiffs cannot sidestep their requirement of proving falsity by alleging false implications, inferences or innuendoes which are no more than unexpressed ideas or opinions at best.

Furthermore, the constitutional protection extended to expressions of opinion provides another basis on which this Court's opinion has deprived the Detroit News of its guaranteed constitutional rights. Federal constitutional law protects the expression of any opinion as long as that opinion is based upon disclosed facts. This principle is based on the Supreme Court's holding in *Gertz* v *Robert Welch Inc.*, 418 US 323 (1974) which has been referred to in connection with the constitutional requirement of proving falsity. It bears repeating in full:

> *Gertz* v *Robert Welch, Inc.*, 418 U.S. 323 (1974):
>
> "We begin with the common ground. Under the First Amendment, there is no such thing as a false idea. However, [sic] pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of ideas." *Id* 339-340.

The court noted that although there is "no constitutional value in false statements of fact, courts must be extremely cautious in applying sanctions simply for an erroneous statement."

> "Punishment of error runs the risk of inducing a cautious and restricted exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels the publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-

censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id* 340.

The application of this principle is best illustrated in *Orr* v *Argus-Press*, 586 F2d 1108 (6th Cir 1978), in which the defendant reported on plaintiff's indictment for a variety of Blue Sky Law violations. The plaintiff did not claim that there were any false statements of fact but objected to the defendant's words characterizing his actions as "swindle," "fraud," and "phony schemes." The Sixth Circuit held that because the facts in the indictment as set forth in the defendant's article were true, the expressions of opinion complained of were constitutionally protected.

"'A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegations of undisclosed defamatory fact as the basis of the opinion. . . .

"It is the function of the court to determine whether the expression of opinion is capable of bearing a defamatory meaning, because it may reasonably be understood to imply the assertion of undisclosed facts which justify the expressed opinion about the plaintiff or his conduct . . . Restatement (Second) of Torts, §566 (1977)."

* * *

"Neither Orr's complaint nor the opinion of the district court identified any specific, factual errors in the article . . . While the words 'swindle' may imply more serious wrongdoing than was involved here, the word is frequently used in colloquial speech as a substitute for 'fraud' . . . Although the word also connotes bad motive and an intent to defraud, the story as a whole sets forth sufficient facts concerning the circumstances of Orr's

indictment and arrest for the reader to draw his own conclusions as to Orr's motives."
(pp 1114, 1112)

The theory behind the law of the constitutional protection for opinions is that as long as a publisher gives the facts, he can make any opinion he wishes because the reader or listener likewise knows the facts that that opinion is based on, and can therefore agree or disagree with the opinion thereby beginning the competition of ideas referred to in *Gertz*. By way of example, and following the logic of *Argus-Press* and *Gertz*, a defendant could report accurate facts as to a plaintiff's financial situation and conclude with the opinion that "credit should not be extended to this person." As long as the facts as to the plaintiff's financial status were accurate, the opinion would be protected as a matter of federal constitutional law.[5] By the same logic, if The Detroit News had concluded its series on Pine Knob with the statement that based upon the facts in The News' reports on Pine Knob, "it would appear that the principals are involved with organized crime," that opinion would be protected as a matter of constitutional law.

Significantly, The News made no such opinion. Rather, it stayed solely with reporting facts. The effect of the Court of Appeals Opinion, however, is to accord The News less constitutional protection than it would have been accorded had it gone the next step and expressed some opinion of the plaintiffs that was *identical* to the implication, inference and innuendo which they claim that the complained of articles had.

---

[5] Note that federal constitutional law would today protect the merchant's opinion "in time of peace prepare for war" based upon his true factual disclosures in *Simons* v *Burnham* and would protect the Daily News' opinions of the pro-German minister based upon its true factual disclosures of his activities in *Van Lonkhuyzen* v *Daily News Co.*

CONCLUSION AND RELIEF REQUESTED

The point of the Michigan law and of the Federal constitutional law is really quite simple. If a publisher limits himself to true and accurate facts, he should not be and is not liable for any conclusion that any listener or reader draws from those true facts. If one reader draws a favorable inference and another reader draws an unfavorable inference, one of them will have necessarily drawn a false inference. However, they can now debate which of them is correct because they both have the benefit of having been given the true and accurate facts. The competition of ideas and views, in which we place so much importance, is then joined. There being no such thing as a false idea or a false opinion when based on true facts, there certainly can be no such thing as a false implication, inference or innuendo when based upon true facts.

The Court of Appeals Opinion permits a plaintiff to continue a libel action after conceding that there are no false facts. The effect of the Opinion is to hold publishers liable for statements they have not made. As such, the Opinion is directly contrary to Michigan law, the Federal constitutional law, and to the commitment to exchange of ideas and information based upon true facts.

The effect of this decision is to throw open the doors to the courtrooms of this state for libel litigation over the publication of true facts. For example, when it is accurately reported that a particular school board member has travel and seminar expenses far in excess of any other member, he will be able to claim that the implication, inference and innuendo of that truthful report is that he is wasting taxpayers' money. When it is truthfully reported that a business is under investigation by the EPA, that business will be able to claim that the implication, inference and innuendo of that truthful report is that it is indifferent to the environment and an irresponsible business. When it is accurately reported that a person has been questioned in con-

nection with a criminal investigation, that person may now claim that the implication, inference and innuendo of that truthful report is that he has committed criminal acts. In short, anyone who does not like his reflection in a mirror can now sue the mirror. This cannot be Court of Appeals intention, but it is surely the effect of its decision.

The citizens of this state have guaranteed rights of free speech. Those rights assure them that if they speak or print true and accurate facts they are protected. The Court of Appeals decision has stripped away that protection. The citizens of this state need this Court's immediate action to restore it.

Respectfully submitted,
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Dated: November 14, 1983

Appendix H

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs,

HON. SUSAN D. BORMAN

vs.

NO: 80-012-145 CZ

THE EVENING NEWS ASSOCIATION,
INC., a Michigan Corporation,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
ROBERT ANKENY, and JIM GRAHAM,
Jointly and Severally,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' LIBEL CLAIMS

At a session of said Court, held in the County of Wayne, State of Michigan on April 2, 1982

PRESENT: Honorable Susan D. Borman
Circuit Judge

Upon the reading and filing of defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that defendants Motion for Summary Judgment as to Plaintiffs' Libel Claims is denied.

(s) SUSAN D. BORMAN
CIRCUIT JUDGE

Approved as to form:
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Appendix H

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,
Plaintiffs-Appellees,

v No. 64729

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES,
JEFF LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
and ROBERT ANKENY,
Defendants-Appellants.

BEFORE: V.J. Brennan, P.J., M.H. Wahls and M. Dodge*, JJ.

PER CURIAM

This lawsuit arises out of a series of eleven allegedly defamatory articles published in the Detroit News between April 27, 1977 and April 25, 1979 concerning the activities of plaintiffs Locricchio and Francell with regard to their development and operation of the Pine Knob entertainment complex. Defendant, the Evening News Association, Inc., publishes the Detroit News, defendant Giles is its editor and Vice-President, and the remaining defendants are reporters, staff writers, and columnists for the Detroit News.

On April 3, 1980, plaintiffs filed a ten-count complaint, the first three counts of which allege a cause of action for libel based on the news articles. The articles, consisting of in excess of 10,000 words, accompanied the complaint. On October 7, 1981, defendants filed interrogatories requesting, among other things, that plaintiffs identify with particularity each and every statement claimed to be defamatory, and

---

* Circuit Judge, sitting on the Court of Appeals by assignment.

each and every statement claimed to contain false statements of fact in each publication relied upon by plaintiffs in support of their libel claims. Plaintiffs responded in part as follows:

> "[T]*he defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the 'Mafia'; individuals of low moral and character;* that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.
>
> * * *
>
> "As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, *the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, the full portrayal, implication, imputation and/or insinuation can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other.* Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes self-evident." (Emphasis added.)

Based on these answers, defendants moved for summary judgment, GCR 1963, 117.2(3). The trial court denied the motion. Defendants take this interlocutory appeal by leave granted.

Defendants assert on appeal, as they did in support of their motion for summary judgment, that no action for libel exists here because plaintiffs admit that their allegations of defamation are not based on a specific false statement in any particular article. Defendants contend that plaintiffs' allegations that the entire series of articles falsely portrayed plaintiffs as members or associates of an organized criminal society, known as the "Mafia", cannot support an action for libel.

We disagree. " 'To test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.' " *Sanders* v *Evening News Association*, 313 Mich 334, 340; 21 NW2d 152 (1946). The pleadings, including plaintiffs' answers to the interrogatories, raise a genuine issue of material fact as to whether the specified articles, read as a whole, carry a defamatory insinuation or inference that plaintiffs are associated with organized crime. Insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion. See *Caldwell* v *Crowell Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5); *cert den*, 332 US 776 (1947), *Memphis Publishing Co* v *Nichols*, 569 SW2d 412, 419-420 (Tenn 1978), 50 Am Jur 2d, Libel and Slander, §13, pp 528-529, Prosser, *Torts*, (4th ed, 1971), §111.

Plaintiffs did not concede the truth of the alleged insinuation. They specifically state in their response to interrogatories that the entire series of articles represented "a *false* portrayal implication, imputation and/or insinuation" that plaintiffs are or were members and/or associates of an organized criminal society, otherwise known as the Mafia.

The pleadings have given rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment.

Appendix H

The trial court properly denied defendant's motion for summary judgment.

Affirmed.

/s/ V.J. Brennan
/s/ M.H. Wahls
/s/ M. Dodge

Appendix H

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Seventeenth day of October in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable
VINCENT J. BRENNAN
Presiding Judge
MYRON H. WAHLS
MICHAEL E. DODGE
Judges

JOSEPH JUDEUS LOCRICCHIO And
GARY FRANCELL,
Plaintiffs-Appellees,

v

Docket #64729
L.C. #80 012 415 CZ

EVENING NEWS ASSOCIATION, INC.,
PETE WALDMEIR, BILL GILES, JEFF
LADERMAN, MICHAEL F. WENDLAND,
JEAN GADOMSKI, RICHARD WILLING,
And ROBERT ANKENY,
Defendants-Appellants.

In this cause an application for rehearing having been filed by defendants-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 24th day of October in the year of our Lord one thousand nine hundred and eighty-three.

(s) Ronald L. Dzierbicki
Chief Clerk

Office-Supreme Court, U.S.
FILED
OCT 23 1984
ALEXANDER L. STEVAS,
CLERK

No 84-437

In The

Supreme Court of the United States

October Term, 1984

THE EVENING NEWS ASSOCIATION, PETE WALDMIER, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM,

Petitioners,

vs.

JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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QUESTION PRESENTED

Should This Court Grant Certiorari Upon Petitioners' Request Where Petitioners Failed To Present To The Trial Court And Now Fail To Present To This Court Any Basis For Granting Petitioners' Motion For Partial Summary Judgment In The Trial Court?

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No. 84-437

In The

Supreme Court of the United States

October Term, 1984

THE EVENING NEWS ASSOCIATION, PETE WALDMIER, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM,

Petitioners,

vs.

JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

OPINIONS AND ORDERS BELOW

Respondents accept Petitioners' statement of the applicable opinions and orders below and incorporate same by reference.

JURISDICTION

Respondents upon information and belief accept Petitioners' statement as to jurisdiction.

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents acknowledge that Petitioners claim interference with the First and Fourteenth amendments of the Constitution of the United States of America; respondents deny any such interference.

———o———

STATEMENT OF THE CASE

Petitioners' Petition for Writ of Certiorari represents the "last gasp" attempt by petitioners (hereinafter "defendants") to partially abolish the law of defamation, at least in the State of Michigan.

Pursuant to editorial decision-making, defendants published numerous calculated defamatory articles about respondents (hereinafter "plaintiffs"), falsely portraying, implying, and insinuating that plaintiffs were members of the so-called "Mafia" or other organized crime group.

As a part of this litigation, each plaintiff has submitted an affidavit under oath that he was not a member of the Mafia.

Defendants have acknowledged at their depositions in this case that they do not believe that plaintiffs were

members of the Mafia or otherwise involved in organized crime, notwithstanding their earlier articles to the contrary, thereby establishing "actual malice".

Plaintiffs' action for defamation (and other theories) was commenced on or about April 3, 1980.

Defendants' second motion for summary judgment, which forms the basis for this attempted appeal, was subsequently filed alleging that there was no genuine issue of material fact. This motion did not attach the requisite affidavit in support based upon personal knowledge. At oral argument on the motion, defendants cited only one case to the trial court, which did not support their position. The trial court denied the motion for summary judgment, finding a genuine issue of material fact.

In initiating its appeal, defendants asked the trial court to certify that there was a controlling question of law involved as to which there was a "substantial ground for difference of opinion" under Michigan law; the trial court declined to do so, as defendants had failed to establish that there existed *any* authority in support of defendants' position.

The Michigan Court of Appeals granted defendants leave for an interlocutory appeal, but after full briefing and oral argument, the Michigan Court of Appeals in an unanimous unpublished per curiam opinion affirmed the trial court.[1] Defendants' request for rehearing was denied.

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[1]A much more detailed account of the underlying facts material to this matter is contained in plaintiffs' Brief on Appeal in the Michigan Court of Appeals, which is reprinted in full in Appendix A *infra,* with minor typographical corrections.

Defendants' application for leave to appeal to the Michigan Supreme Court was denied, as that court was not persuaded that interlocutory review was necessary. Defendants' request for reconsideration was denied.

Defendants' present Petition for Writ of Certiorari should similarly be denied, for the reasons set forth below.

—o—

REASONS FOR DENYING THE WRIT

I. Defendants' Petition For Writ Of Certiorari Is Both Factually Erroneous And Misleading.

For purposes of correcting defendants' erroneous and misleading statements of fact in defendants' Petition for Writ of Certiorari, plaintiffs advise this Court that:

1. Plaintiffs, contrary to defendants' characterization in their "Statement of the Case", page 3, paragraph 1, sentence 1, are *not* the primary operators of Pine Knob. Many of the operations of Pine Knob have been conducted by the Nederlander theater organization since 1972, including the Pine Knob Music Theater itself. Further, *as previously reported by defendants' own newspaper,* plaintiffs have lost their interest in Pine Knob through involuntary bankruptcy proceedings.[2] Plaintiffs submit, and stand

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[2]*Detroit News,* February 23, 1984, page 3-A, column 4; defense counsel apparently do not subscribe to defendants' advertising claims that "If you read the *News* you know"; *see also In the Matter of Pine Knob Investment Company,* United States Bankruptcy Court, Eastern District of Michigan, Consolidated Case Nos. 80-00872-G; 80-00873-G; 80-00874-G; and 80-00875-G, including February 15, 1984, Amended Order Confirming Sale of Assets.

ready to prove at trial, that the loss of their ownership of and other beneficial interests in the operations of Pine Knob was proximately caused by defendants' false and defamatory publications regarding plaintiffs' business activities.

2. Plaintiffs, contrary to defendants' assertion in their "Statement of the Case", page 3, paragraph 2, sentence 1, have never had "public careers" and are not in fact public figures of any type; defendants have not asked the trial court to so hold and no court has in fact so held.

3. Plaintiffs, contrary to defendants' assertion in said sentence, have never been "charged with organized crime involvement" except by the *Detroit News,* its parent corporation (defendant Evening News Association), and other named defendants in this action.

4. Upon information and belief and contrary to the undocumented assertion contained in page 3, paragraph 3, sentence 1 of said "Statement", no print or electronic reports concerning plaintiffs appeared in the media prior to the commencement of defendants' calculated and unfounded smear campaign against plaintiffs.

5. Contrary to page 3, paragraph 4, sentence 4 of said "Statement", plaintiffs' initial Complaint in state court *attached as exhibits each of defendants' false and defamatory articles,* clearly notifying each defendant of the statements forming the basis for plaintiffs' defamation claims, consistent with Michigan defamation pleading requirements.[3]

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[3]*See, e.g., Wynn v. Cole,* 68 Mich App. 706; 243 N.W.2d 923 (1976); *De Guvera v. Sure Fit Products,* 14 Mich App. 201; 165 N.W. 2d 418 (1968) (in a declaration of libel plaintiff merely must set forth the contents of the alleged libel and where it was published).

6. Contrary to page 4, second full paragraph, sentence 2, of said "Statement", plaintiffs have never stated that "they did not base their libel claim on any false statement of fact"; to the contrary, plaintiffs submit that defendants' publications constitute one or more false statements of fact, creating a false and defamatory statement about and concerning plaintiffs through half-truths and calculated insinuations, implications, innuendos, portrayals, characterizations, and imputations. Defendants have reiterated this false characterization of plaintiffs' position in this litigation at various locations in their Petition;[4] of course—and despite defendants' best misleading efforts—repetition of a false statement by defendants, in this instance defendants' misstatement of plaintiffs' litigation posture, does not make the false statement true. Plaintiffs therefore respectfully ask this Court to disregard these false statements in its consideration of defendants' Petition.

7. Contrary to defendants' misleading statement in the second sentence of the first full paragraph on page 6 of said "Statement", the Michigan Court of Appeals did not hold that plaintiffs "had not and could not identify any statement of fact contained in the news reports which they claim is false" nor did that Court's decision state or imply that plaintiffs gave defendants "absolutely no notice of what they are called upon to defend in this action." Defendants' "Statement" is not only misleading but also improperly argumentative. Defendants' version somehow misconstrues the following plain language of the Michigan Court of Appeals, which stated in pertinent part:

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[4]*See, e.g.*, "Statement of the Case", page 5, first full paragraph, sentence 2.

> Insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion.
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> • • •
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> Plaintiffs did not concede the truth of the alleged insinuation.[5]

Furthermore, the *unpublished* per curiam decision of the Michigan Court of Appeals did not discuss at all defendants' present "due process-notice" argument as it was not developed by defendants in that forum.

8. Defendants' characterization of the Michigan Supreme Court's action on defendants' application for leave to appeal to that forum is misleadingly incomplete. In the second paragraph, third sentence on page 6 of said "Statement", defendants' imply that the Michigan Supreme Court made a decision on the merits in this matter; that implication is inaccurate. As set forth in defendants' Appendix D to their Petition, the Michigan Supreme Court merely denied leave to appeal "because the Court is not persuaded that the question should *now* be reviewed by this court."[6]

Plaintiffs submit that these negligent and/or intentional misstatements, both erroneous and misleading, are sufficient grounds alone for this Court to exercise its discretion under its Rule 17 to deny this Petition, pursuant to the provisions of this Court's Rule 21.5.[7]

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[5]Petitioners' Appendix B, at 5a (citations omitted).

[6]Petitioners' Appendix D, at 10a (emphasis added).

[7]Rule 21.5 states in pertinent part: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." *Rules of the Supreme Court of the United States,* Rule 21.5 (1980) (as revised and amended).

II. Defendants' Petition For Writ Of Certiorari Is Without Merit.

Rule 17.1 of this Court's Rules states in pertinent part that:

> A review of writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered.
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> * * *
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> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.[8]

For the reasons set forth below, defendants' Petition is without merit, particularly in light of this Court's stated considerations.

A. The Michigan Supreme Court Has Not Decided Any Issue In This Case.

As stated above, the Michigan Supreme Court has not decided any issue in this case. The Michigan Supreme Court's only relevant action has been to deny defendants' Application for Leave to Appeal to that court due to defendants' failure to persuade that court that review by that court was necessary at that time.[9] Clearly, no deci-

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[8] *Id.* at Rule 17.

[9] *Id.* Reconsideration was also denied by the court, "because it does not appear that the order was entered erroneously." Petitioners' Appendix E, at 11a.

sion on the merits of defendants' claims—or lack thereof —was made by that court.

B. The Michigan Supreme Court Has Not Decided Any Federal Question In This Case, And Therefore, Has Not Decided Any Federal Question In Conflict With The Decision Of Any Other Court.

The Michigan Supreme Court has not decided any issue in this case. *A fortiori,* the Michigan Supreme Court has not decided any federal question in this case. *A fortiori,* the Michigan Supreme Court has not decided any federal question in this case in conflict with the decision of any other state court of last resort or of a federal court of appeals. Therefore, under Rule 17.1(b), certiorari is disfavored and should be denied.

C. The Decision Of The Michigan Court Of Appeals In This Case Was An Unpublished Per Curiam Decision Having No Precedential Effect.

The August 24, 1983, decision of the Michigan Court of Appeals in this matter was an *unpublished, per curiam decision.* In Michigan, unpublished decisions of the Michigan Court of Appeals have no precedential effect whatsoever.[10]

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[10]*W. E. Westfall, Inc. v. Michigan Bell Telephone Co.,* 129 Mich. App. 301, 303-304; 341 N.W. 2d 514 (1983) ("We remind members of the bench and bar that unpublished opinions of this Court are without precedential value."); *Moultrie v. DAIIE,* 123 Mich. App. 403, 407-408; 333 N.W. 2d 298 (1983); *Borgess Hospital v. Berrien County,* 114 Mich. App. 385, 386 n. 1; 319 N.W. 2d 354 (1982), *leave denied,* 417 Mich. 865 (1983).

D. The Decision Of The Michigan Court Of Appeals In This Case Was Correct, Proper, And Consistent With Earlier Decisions Of The Michigan And Federal Courts.

Unfortunately, defendants' Petition needlessly but apparently intentionally muddles critical concepts. Once those concepts are clarified and reference made to earlier decisions of the Michigan and federal courts, it is clear that the unpublished decision of the Michigan Court of Appeals in this case was correct, proper, and consistent.

1. The word "statement" means more than "word by word" or "sentence".

Defendants' Petition unnecessarily and inappropriately attempts to limit the word "statement" to mean "word by word" or "sentence".

This is not the common, or the legal, understanding of the word "statement", which is "communication creating an impression". Commonly accepted "statements" include "fashion statements", themes in musical compositions, summaries of financial data, and other impressions. The *Merriam-Webster Thesaurus* (1978) regards "statement" as synonomous with "expression", as does *Webster's Collegiate Thesaurus* (1976), which further relates "statement" to "outgiving", "presentation", and "presentment".

Further, legal definitions support a broader interpretation of "statement" than that ascribed to by defendants. FED. R. EVID. 801(a) specifically defines "statement" to include both oral and written assertions and "nonverbal conduct of a person"; FED. R. EVID. 801(a) does

not say "word by word" or "sentence".[11] Similarly, in *Turner v. Brien*,[12] the Iowa Supreme Court correctly noted that "it is the thought conveyed, not the words, that does the harm".

Clearly, "statement" means communication creating an impression, not "word by word" or "sentence". Defendants have had notice of each such statement since the day they were served with the initial Complaint in this matter, which attached as exhibits copies of each of the defamatory articles.[13]

2. Defendants needlessly muddle pretrial and trial standards when discussing plaintiffs' burden of proof.

Defendants further seek unnecessarily to confuse this Court by their implicit reliance on factually and procedurally distinct legal precedents, needlessly muddling *pretrial* and *trial* standards.[14]

Defendants, for example, have repeatedly relied upon *Postill v. Booth Newspapers*[15] and *Gaynes v. Allen*[16] as

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[11]See *also* MICH. R. EVID. 801(a) (identical to FED. R. EVID. 801(a)); *Black's Law Dictionary* 1263 (revised 5th ed. 1979) (*"In a general sense, an allegation . . . ."*). In this context, "allegation" is synonomous with "implication", "innuendo", "portrayal", and "insinuation".

[12]184 Iowa 320, 326; 167 N.W. 584, 586 (1918).

[13]See text accompanying n. 2 *supra*.

[14]This muddling takes place principally in Petitioners' Appendix H, which incorporates a substantial portion of defendants' earlier pleadings in the Michigan Supreme Court, and which implicitly is suggested to this Court as grounds for granting defendants' Petition.

[15]118 Mich. App. 608, 618; 325 N.W. 2d 511 (1982).

[16]128 Mich. App. 42; 128 N.W. 2d 42 (1983).

supportive of their quest for summary judgment. Defendants rely upon *Postill* for the proposition that "plaintiff still must prove falsity."[17] Defendants apparently read *Postill* to abolish Michigan General Court Rule 117.2(3)[18] in defamation cases involving the *Detroit News;* rather than ascertaining whether there exists a genuine issue of material fact precluding disfavored summary disposition, the *Detroit News* would have the trial court swear a jury and take "proofs" in a mini-trial upon their filing of a motion for summary judgment. Defendants apparently read the post-trial *Postill* decision to call for accelerated

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[17]Petitioners' Appendix H at 66a-67a generally; quotation at 67a, lines 2-3.

[18]Michigan General Court Rule 117.2(3) (cited in Michigan court pleadings as GCR 1963, 117.2(3)). Defendants' second motion for summary judgment in the trial court, dated March 12, 1982, was expressly based upon the provisions of Michigan General Court Rule 117.2(3), "that except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is, therefore, entitled to judgment as a matter of law." *See by analogy* Fed. R. Civ. P. 56(c).

In support of their second Motion for Summary Judgment, defendants *argued* that there existed no genuine issue as to any material fact as plaintiffs had admitted the truth of each of the defamatory newspaper articles. As set forth at length above, this was a false assumption; plaintiffs indicated that the claims were not necessarily based upon a particular sentence, but that the entire series of articles falsely portrayed, insinuated, imputed and/or implied that plaintiffs were members of the Mafia. In further support of their response, plaintiffs each signed an affidavit indicating that they were *not* members of the Mafia. Defendants failed to comply with the requirements of Rule 117.3 by failing to attach an appropriate factual supporting affidavit with their second summary judgment motion; no affidavit based upon personal knowledge was ever submitted by defendants in support of their second motion for summary judgment. Under Michigan law, failure to file such an affidavit means the Motion for Summary Judgment must automatically be denied by the trial court. *See, e.g., DeMare Brothers Const. Co., Inc. v. Teska,* 49 Mich. App. 642; 212 N.W. 2d 602 (1973).

trials and proofs; such is not the case. The post-trial *Postill* decision obviously (1) did not address pre-trial summary judgment standards and (2) did not establish any mini-trial requirement. Plaintiffs will comply with the falsity requirement at trial; plaintiffs stand ready to prove liability and damages at trial, but are not required to do so under Michigan procedural law on defendants' motion for summary judgment, only that "a genuine issue of material fact" exists, which is the case unless defendants are now admitting the false and defamatory nature of their publications.

Similarly, defendants' reliance in this forum on post-trial cases such as *New York Times Co. v. Sullivan,*[19] *Gertz v. Robert Welch, Inc.,*[20] and *Curtis Publishing Co. v. Butts*[21] is misleading and regrettable. In each of those cases this Court considered a *post-trial* appeal from jury verdicts of $500,000, $50,000, and $960,000[22] respectively.

Plaintiffs will prove falsity at trial, before a jury of their peers. Plaintiffs are not constitutionally or otherwise required to "prove" falsity prior to trial, merely to state a claim and demonstrate that there exists a genuine issue of material fact, including as to the "falsity" requirement, which has been done.[23]

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[19]376 U.S. 254 (1964).

[20]418 U.S. 323 (1974).

[21]388 U.S. 130 (1967).

[22]This Court's *Curtis Publishing* decision considered two cases simultaneously, *Curtis Publishing Co. v. Butts* (with a verdict of $460,000) and *Associated Press v. Walker* (with a verdict of $500,000).

[23]Michigan General Court Rule 117.

3. Contrary to defendants' brash characterization of the impact of the Michigan Court of Appeals' unpublished decision in this case, this decision has had no known impact on free speech in Michigan or elsewhere.

As noted above, the decision of the Michigan Court of Appeals in this matter was an unpublished per curiam decision with no precedential effect.[24] Upon information and belief, the only generally published note regarding this Michigan Court of Appeals decision appeared in the *Detroit News* itself.[25] For defendants to attempt to bootstrap and/or manipulate the public's knowledge of this unpublished and non-precedential decision into some perceived "chilling effect" is preposterous, particularly when defendants seek to blame their own publications for creating this perceived "chilling effect".

Even more incredible is defendants' apparent argument that the Michigan Court of Appeals decision—wholly consistent with prior law (case law and statutory) in the states of Michigan,[26] Tennessee,[27] New York,[28] Iowa,[29] Lou-

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[24]See n. 9 *supra*.

[25]*Detroit News*, August 26, 1983, page 4-B, column 1 (including republication of defamatory material, thereby exacerbating plaintiffs' damages).

[26]Important Michigan statutory law includes Mich. Comp. Laws Annotated § 600.2911 (imputation of unchastity; imputation of a crime).

Important Michigan case law includes a 1983 decision against the *Detroit News*, *Lins v. Evening News Association*, 129 Mich. App. 419; 342 N.W. 2d 573 (1983), wherein the Michigan Court of Appeals stated:

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> In his opinion, the trial judge concluded that, as a matter of law, *taking the column as a whole,* a legally actionable claim was asserted because it was susceptible of an interpretation which could harm the reputation of plaintiffs. Thus, he rejected defendants' claim that the article was not defamatory. We agree with the trial court. *Nuyen v. Slater,* 372 Mich. 654, 662; 127 N.W. 2d 369 (1964); *Iacco v. Bohannon,* 70 Mich. App. 463; 245 N.W. 2d 791 (1976), leave denied, 399 Mich. 846 (1977); 3 Restatement of Torts, § 559, p. 140. (emphasis added).

Plaintiffs herein also rely upon the following additional Michigan Supreme Court cases in general support of their three defamation counts: *Kenney v. Hatfield,* 351 Mich. 498, 512; 88 N.W. 2d 535 (1958) ("a publication imputing impairment of mental facilities is libel per se"); *Sanders v. Evening News Ass'n.,* 313 Mich. 334, 343; 21 N.W. 2d 152 (1946) (defendants' publication must be "fairly and reasonably construed"); *Hysko v. Polonia Publishing Co.,* 239 Mich. 676, 681; 215 N.W. 3 (1927) ("The words are to be taken in the sense in which they would be understood by those who read them."); *Moore v. Booth Publishing Co.,* 216 Mich. 653, 656, 185 N.W. 780 (1921); *Lonkhuyzen v. Daily News Co.,* 195 Mich. 283, 295; 161 N.W. 979 (1917); *Simons v. Burnham,* 102 Mich. 189, 195-97 (1894) ("leaving to the jury . . . the question of the meaning"); *Edwards v. Chandler,* 14 Mich. 471, 476; 90 Am. Dec. 249 (1866) ("[W]e are not prepared to say that a jury could not draw such an inference without reasonably stretching or perverting the sense. Such language must be construed by the jury, and not by the court.").

[27]*Memphis Publishing Co. v. Nichols,* 569 S.W. 2d 412, 419-420 (Tenn. 1978) ("Whether the news article . . . was . . . understood by readers in its defamatory sense is ultimately a question for the jury. * * * In our opinion, the defendant's reliance on the truth of the facts stated in the article in question is misplaced. The proper question is whether the *meaning* reasonably conveyed by the published words is defamatory.").

[28]*Fleckenstein v. Friedman,* 266 N.Y. 19, 23; 193 N.E. 537, 538 (1937) ("whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced").

[29]*Brown v. First National Bank,* 193 N.W. 2d 547, 553 (Iowa 1972) (truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true).

isiana,[30] Massachusetts,[31] California,[32] Alabama,[33] Delaware,[34] Florida,[35] and South Carolina[36]—had any chilling effect whatsoever on any person; defendants offer no support for such a preposterous contention.

4. The state court's decision in this case was consistent with Michigan law.

Michigan law favors decision-making by the trier of fact (judge or jury) at the time of trial; conversely, Mich-

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[30]*Schaefer v. Lynch*, 406 So. 2d 185, 188 (La. 1981) ("A defamatory meaning is insinuated. When truthful statements carry a defamatory innuendo, the implication should also be true to justify publication. [T]ruthful statements which carry a defamatory implication can be actionable.").

[31]*Mikhalik v. Duprey*, 417 N.W. 2d 1238, 1239 (Mass. App. 1981); *Tropeano v. Atlantic Monthly Co.*, 379 Mass. 745; 400 N.E. 2d 847 (1980).

[32]See, e.g., *Howard v. Southern California Ass'd Newspapers*, 95 Cal. App. 580; 213 P. 2d 399 (1950), *overruled in part on other grounds sub nom., Field Research Corp. v. Superior Court*, 77 Cal. Rptr. 243; 453 P. 2d 747 (1969) (scope of California punitive damages statutes); *Harris v. Curtis Publishing Co.*, 49 Cal. App. 2d 340; 121 P. 2d 761 (1942).

[33]*Marion v. Davis*, 217 Ala. 16, 18; 114 So. 357, 359 (1927) (words are equally actionable if the defamatory charge is made indirectly or by necessary inference, no matter how artfully disguised).

[34]*Rice v. Simmons*, 2 Harr. (Del.) 417, 433; 31 Am. Dec. 766 (1839) ("The character of a libel is to be judged by the effect it produces on the mind, . . . and . . . may depend much upon inferential reasoning.").

[35]*Caldwell v. Cromwell-Collier Publishing Co.*, 161 F. 2d 333, 335-36 (5th Cir.) (applying Florida law to a nationwide publication), *cert. denied*, 332 U.S. 766 (1947).

[36]*Duncan v. The Record Publishing Co.*, 145 S.C. 196; 143 S.E. 31 (1927) ("[I]t does not follow that such literal truth was a complete defense, as appellants contended. * * * [T]he publication, literally true as it was, was intended to convey and conveyed to readers thereof the defamatory meaning attributed thereto . . . .").

igan law generally disfavors summary dismissal of civil cases prior to trial.

This philosophy is embodied in part in Michigan General Court Rule 117.2(3), which precludes the granting of summary judgment as requested by defendants in the trial court unless procedurally defendants attach an appropriate factual supporting affidavit to their motion for summary judgment[37] and unless substantively defendants demonstrate that (1) there exists no genuine issue of material fact and (2) defendants are therefore entitled to judgment as a matter of law.[38]

In this case, defendants failed to meet all three procedural and substantive requirements. In fact, defendants failed to meet even one of these requirements.

Defendants did not submit the required affidavit. Defendants did not demonstrate that the jury could not as a matter of law determine that the portrayals, implications, imputations, and insinuations plainly generated by defendants' articles were both defamatory and false, particularly in light of plaintiffs' own factual affidavits that they were not members of the Mafia.

Summary judgment was therefore properly denied by the trial court.

For the same reasons, the Michigan Court of Appeals properly affirmed the trial court's denial of summary judgment.

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[37]MICH. GEN. CT. RULE 117.3.

[38]MICH. GEN. CT. RULE 117.2(3).

Clearly, from plaintiffs' attachment of each defamatory article to plaintiffs' Complaint and from plaintiffs' answers to defendants' fourth set of interrogatories to plaintiffs,[39] as well as from plaintiffs' five previous ap-

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[39]Answering defendants' Fourth Set of Interrogatories, plaintiffs stated on February 24, 1984, in pertinent part that:

> In regard to Interrogatory 1(a), plaintiffs, JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that the *defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article,* but, rather, that *the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation, and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia";* individuals of low moral and character; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.
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> * * *
>
> As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, *the full portrayal, implication, imputation and/or insinuation can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other. Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes self-evident.* (emphasis added).

If this Court has not already done so, and if this Court retains any question about the defamatory nature of these articles, the Court is directed to review the actual articles published by defendants.

pellate briefs in the courts below,[40] defendants have had adequate and repeated notice, dating to April 3, 1981, that plaintiffs intended to hold defendants accountable for their defamatory and false portrayals, insinuations, imputations, and implications of and regarding plaintiffs. There should be no surprise, no ignorance as to these allegations; each has been clearly submitted to defendants through their counsel. For defendants to now claim some lack of requisite notice of plaintiffs' claims is ridiculous; defendants' "high-brow" Fourteenth Amendment argument is not on point and fails to cite any case which accurately supports its position.

Furthermore, by implication, defendants seek to invalidate the very procedural rule they sought to invoke in their motion for summary judgment, Michigan General Court Rule 117.2(3); having failed to rewrite established, proper, and constitutional Michigan and recognized nationwide common law with their motion, defendants now seek to carve out some defamation exception to the Michigan procedural rule (which is virtually identical to the operative language approved by this Court in Federal Rule of Civil Procedure 56(c)) they earlier sought to employ. No grounds whatsoever, except ungracious recognition of the fact that defendants will be judged by a

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[40]Plaintiffs' July 2, 1982, Response in Opposition to Defendants' Application for Leave to Appeal (Michigan Court of Appeals); plaintiffs' January 26, 1983, Brief on Appeal (Michigan Court of Appeals); plaintiffs' September 12, 1983, Response in Opposition to Defendants' Motion for Rehearing (Michigan Court of Appeals); plaintiffs' December 12, 1983, Response in Opposition to Defendants' Application for Leave to Appeal (Michigan Supreme Court); and plaintiffs' May 23, 1984, Response in Opposition to Defendants' Vexatious Motion for Reconsideration (Michigan Supreme Court).

jury of their peers for their unexcusable defamatory statements, has been set forth for action by this Court. This Court must not condone this type of unsupported—and unsupportable—attempt to rewrite both established defamation law and recognized and fair procedural devices to resolve factual disputes.

For these reasons, defendants' Petition must be denied.

5. The state court's decision in this case was consistent with earlier decisions of the federal court of appeals.

While this Court's Rule 17.1(b) indicates that a decision in conflict with the decision of a federal court of appeals may present grounds for granting a writ of certiorari, it is clear that applicable federal court of appeals decisions actually support the treatment provided this matter by the Wayne County Circuit Court and the Michigan Court of Appeals.

Initially, plaintiffs note that defendants rely upon but one case from a federal court of appeals, *Wilson v. Scripps-Howard Broadcasting Co.*[41] Defendants, however, again misleadingly rely upon *Wilson* for overbroad application. A fair—and correct—reading of *Wilson* reveals that *Wilson* is yet another post-verdict (not summary judgment) case, and therefore has very limited application to this case. *Wilson* stands for the proposition, after *Gertz v. Robert Welch, Inc.*,[42] that the First Amend-

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[41]642 F. 2d 371 (6th Cir.), *cert. granted,* 454 U.S. 962 (1981) (settled prior to oral argument).

[42]418 U.S. 323 (1974) *(Gertz I).*

ment requires the plaintiff in a libel case to prove fault (fault may not be presumed), and as a consequence, plaintiff has the burden of proof to prove falsity as well as defamatory content. Plaintiffs herein accept that burden and anticipate imposing liability based upon fault at trial in this case. Accordingly, the trial court's decision is completely consistent with *Wilson*.[43]

Plaintiffs rely further upon *Caldwell v. Crowell-Collier Publishing Co.*[44] in support of the trial court's disposition of defendants' second motion for summary judgment. In *Caldwell,* the Fifth Circuit reversed the trial court's dismissal of plaintiff's suit based upon failure to state a claim, stating in pertinent part that:

> A libel is a compound of written falsity and malicious publication, but *the falsity may consist in untrue imputation as well as a direct statement,* and malice may be inferred from the nature of the charges made. *False imputations may be actionable per se,* that is in themselves, *or per quod,* that is on allegation and proof of special damages.
>
> • • •
>
> It is not necessary that the false charges be made in a direct manner, if the words in their ordinary meaning convey it, and *an insinuation is as actionable as a positive assertion* if the meaning is plain.[45]

Once again, *Caldwell* supports lower court treatment of this matter.

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[43]Plaintiffs do not speculate as to the meaning, if any, to be ascribed to this Court's decision to grant certiorari in *Wilson, supra* at n. 41.

[44]See n. 35 *supra.*

[45]*Id.* (emphasis added).

Thus, defendants fail to demonstrate any conflict with the decision of any federal court of appeals; to the contrary, both the Fifth and Sixth circuits have treated federal defamation actions in the same or similar fashion as this defamation action has been treated by the Michigan courts.

Accordingly, no ground for certiorari exists under this Court's Rule 17.1(b), and defendants' Petition must be denied.

6. The state court's decision in this case is consistent with earlier decisions of this Court.

Contrary to defendants' assertions, the lower court treatment of this matter has been completely consistent with earlier decisions of this Court.

As noted above, defendants' excessive reliance on post-trial cases such as *Postill, Gaynes, New York Times, Gertz,* and *Curtis Publishing*[46] is regrettable. Further, defendants' inappropriate and overnarrow interpretation of "statement", overlooking defendants' clear message that plaintiffs were members of the Mafia, makes defendants' cited *Garrison v. Louisiana,*[47] *State v. Burnham,*[48] and *Letter Carriers v. Austin*[49] cases similarly inappropriate. None of these cases are inconsistent with this case.

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[46]See nn. 14-23 & accompanying text *supra.*

[47]379 U.S. 64 (1964).

[48]9 N.H. 34 (1837).

[49]418 U.S. 264 (1974).

Similarly, defendants' self-impressive due process argument conveniently ignores the notice repeatedly given by plaintiffs and received by defendants regarding plaintiffs' defamation allegations against defendants.[50] Defendants have been and are clearly on notice that plaintiffs intend to prove at trial that defendants published to third persons unprivileged defamatory and false statements of and concerning plaintiffs (or if subsequently found to be privileged, that same were published with "actual malice").[51] Accordingly, defendants' due process authorities, including *NAACP v. Burton*,[52] *Gooding v. Wilson*,[53] and *Winters v. New York*[54] are clearly inapplicable, nothwithstanding the requisite fact of absence of any alleged unconstitutional statute.

On the contrary, the handling of this matter by the Michigan courts to date is consistent with federal authorities including *Gertz;* even at this pretrial stage, it is clear that no liability will be imposed on defendants absent proof of fault at trial.

Thus, in this case, no state court has decided a federal question in conflict with any applicable decision of this Court; certiorari is therefore disfavored under this Court's Rule 17.1(c) and should be denied.

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[50]See nn. 39-40 and accompanying text *supra*.

[51]*See, e.g., Sanders v. Evening News Ass'n.*, 313 Mich. 334, 340; 21 N.W. 2d 152 (1946); *Jones v. Schaeffer*, 122 Mich. App. 301, 304; 332 N.W. 2d 423 (1982).

[52]371 U.S. 415 (1963).

[53]405 U.S. 518 (1971).

[54]333 U.S. 507 (1948).

7. This case presents no unsettled important question of federal law which has not been, but should be, settled by this Court.

As noted above, the Michigan courts below properly handled defendants' second motion for summary judgment, consistent with Michigan procedural and substantive law, consistent with common law in at least 10 other states, consistent with an earlier decision of the Fifth Circuit Court of Appeals, consistent with this Court's earlier decision in *Gertz,* and not inconsistent with any decision of the Sixth Circuit, any other circuit, or this Court.

Particularly in this pretrial posture and particularly in light of defendants' inability to cite any case or other authority in actual support of their position—either in the trial court on April 2, 1982, or in this Court today, there exists no reason whatsoever for this Court to now consider a heretofore settled question of federal law.

Accordingly, certiorari is disfavored under this Court's Rule 17.1(c) and should be denied.

———o———

CONCLUSION

Defendants' Petition for Writ of Certiorari sets forth (and there exists) no basis for this Court to grant certiorari in this matter, including but not limited to pursuant to this Court's Rule 17.1(b) and/or 17.1(c).

Furthermore, defendants' Petition is materially erroneous and misleading and should be denied pursuant to this Court's Rules 17 and 21.5.

For these reasons, plaintiffs respectfully pray and ask that defendants' Petition for Writ of Certiorari to the Supreme Court for the State of Michigan be denied.

Respectfully submitted,

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DATED: October 17, 1984

APPENDIX A

STATE OF MICHIGAN
IN THE COURT OF APPEALS

Court of Appeals
No.: 64729

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,

Plaintiffs-Appellees,

v

THE EVENING NEWS ASSOCIATION, INC., a Michigan Corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, jointly and severally,

Defendants-Appellants.

Wayne County Circuit Court
No.: 80-012145 CZ

PLAINTIFFS' BRIEF ON APPEAL

AFFIDAVIT OF COUNSEL

AFFIDAVIT OF SERVICE

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I

WHETHER DEFENDANTS, AFTER WAIVING ALL RIGHTS TO REHEARING AND/OR APPEAL, MAY ARGUE THAT "PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR LIBEL"?

The trial court did not consider whether defendants waived their right to appeal the 1981 denial of defendants' motion for summary judgment pursuant to GCR 1963, 117.2(1).

Plaintiffs answer "No".

II

WHETHER THE TRIAL COURT PROPERLY DENIED A SUMMARY JUDGMENT MOTION BROUGHT PURPORTEDLY PURSUANT TO GCR 1963, 117.2(3), WHEN THAT MOTION WAS NOT SUPPORTED BY A PROPER AFFIDAVIT?

The trial court did not need to reach this question but reached the right result for another reason.
Plaintiffs answer "Yes".

III

WHETHER PLAINTIFFS' AFFIDAVITS, PLEADINGS AND OTHER MATERIALS SUPPORTED THE TRIAL COURT'S FINDING, PARTICULARLY WHERE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO GCR 1963, 117.2(3), WAS UNSUPPORTED BY A PROPER AFFIDAVIT?

The trial court answered "Yes".
Plaintiffs answer "Yes".

COUNTER-STATEMENT OF FACTS

Due to defendants' continued and blatant disregard for the truth, including at a minimum the publications

which form the basis of this litigation and the purported "Statement of Facts" contained in defendants' Appellants' Brief on Appeal, plaintiffs submit the following Counter-Statement of Facts:

Pursuant to editorial decision-making, numerous defamatory articles regarding plaintiffs were published by The Detroit News, written by various Detroit News reporters, columnists, editors, and staff writers. Among these writers were Michael F. Wendland and Genevieve Gadomski. Despite repeated imputations, insinuations, implications, and portrayals by The Detroit News that plaintiffs were members of the so-called "Mafia" or some other organized crime groups—including articles to that effect by defendants Wendland and Gadomski—defendants Wendland and Gadomski have testified that they never substantiated their published imputations, insinuations, implications, and portrayals. Plaintiffs have alleged and will prove that these published imputations, insinuations, implications and portrayals are, in fact, false.

Highlighting the fact that defendants knowingly published articles capable of defamatory interpretation is defendant Wendland's own deposition testimony:

Q. (by plaintiffs' counsel)
In January or February of 1979 you again were asked to do some investigation into Pine Knob, correct?

A. (Mr. Wendland)
That is correct.

Q. And from whom, if anyone, did you get that assignment?

A. That assignment came specifically from Bill Lutz.

Q. Do you know how or why that assignment again was generated?

A. I think that it was, as I recall, I sat down in his office and we discussed a number of projects that I would be working on and at that time he felt that I should concentrate my efforts into the Pine Knob story.

Q. Did he tell you why

A. Well, Pine Knob, as I recall, he had heard these rumors, and Pine Knob is certainly now and was then the premier entertainment complex in this area. It was a fascinating story and those rumors were widespread enough that he felt it was in our interest, the newspaper's interest, to look into it. That's what our job is.

Q. When you say it was in the newspaper's interest to look into it, what do you mean by that?

A. It's the newspaper's job to report the news and the Pine Knob stories and those rumors were certainly news. There is a little sign up on the top of the Detroit News Building with engraved stone that kind of says, I guess, what the newspaper is supposed to do and one of the things is the mirror of the public eye.

Q. Well, what about rumors makes it news?

A. Well, when rumors are widespread, as they certainly were in this case, a newspaper's job and role in the community is to try and sort out the rumors from the truth.

* * *

Q. Mr. Wendland, did you ever get—strike that.

Were you ever able to separate the rumor from the truth about organized crime involvement in Pine Knob, to your satisfaction?

A. Yeah, to my satisfaction I believe so.

Q. And what was that separation?

A. I don't believe there is any organized crime involvement in the ownership of Pine Knob.

Q. Was that your feeling before these articles appeared, sir?

A. I had no feeling. I didn't know.

Q. *After you began your investigation and at the completion of your investigation but while you were writing the articles, was that your feeling, that there was no organized crime involvement in Pine Knob?*

A. *Yes.*

Q. That's what your investigation had shown to your satisfaction at least?

A. Yes. I was satisfied that I could not say that Pine Knob was an organized crime business. It was not provable that I could find. I don't believe that there was any.

(Wendland deposition, p. 15, line 6—p. 16, line 22; p. 47, line 23—p. 48, line 18) (emphasis added). Ms. Gadomski's deposition is equally illustrative:

Q. (by plaintiffs' counsel)

Were you aware prior to beginning your investigation that led into these stories that you were looking into rumors that there was organized crime involved with Pine Knob?

A. (Ms. Gadomski)
Yes.

Q. Who made you aware of that?

A. I don't know. They were floating around.

Q. I asked you, though, whether you were told prior to beginning your research that you were looking into rumors specifically that organized crime was involved in Pine Knob?

A. Yes.

Q. And who informed you of that?

A. Bill Lutz.

Q. Do you feel that your research and investigation that you performed in relation to this Pine Knob Story substantiated that there is organized crime involvement at Pine Knob?

A. No.

* * *

Q. But if I understand your testimony correctly, you indicated that your research and investigation did not show that there was any organized crime involvement at Pine Knob?

A. We couldn't substantiate it.

Q. Did you report your findings to anyone at the Detroit News?

A. Not to any individual, no.

(Gadomski deposition, p. 29, line 14—p. 30, line 4; p. 30, lines 14-19).

Notwithstanding the fact that defendants' own investigation disclosed that Pine Knob was *not* "an organized crime business" and found no substantiation for the belief that Pine Knob had organized crime involvement, defendants went ahead with their series of articles on Pine Knob linking plaintiffs with the murder of Harvey Leach, head of the Joshua Doore furniture store chain, and a second murder, as well as assorted other organized crime and "Mafia" figures.

Accordingly, after a due demand for retraction was made pursuant to MCLA 600.2911; MSA 27A.2911 and rejected, plaintiffs instituted this litigation on or about

April 3, 1980, alleging, among other things, that these articles were libelous.

On or about April 30, 1981, defendants filed an initial motion for summary judgment, pursuant to GCR 1963, 117.2(1), claiming in part that the libel allegations contained in plaintiffs' Complaint failed to state a claim upon which relief could be granted, allegedly because defendants failed to specify the alleged libelous statements.

The circuit court denied defendants' motion for summary judgment on plaintiffs' libel counts on the basis that the requirement that the content of the allegedly libelous information be set forth in the Complaint was satisfied by plaintiffs' attachment of the subject articles to their Complaint (an amended complaint was filed on or about March 17, 1982; the libel allegations in both the original and amended complaint are identical; the same articles were also attached to the amended complaint). No motion for rehearing, much less an application for leave to appeal to this Court, was ever filed by defendants regarding the trial court's denial of defendant's GCR 1963, 117.2(1), motion for summary judgment.

After defendants filed their initial motion for summary judgment, defendants submitted three sets of interrogatories on or about August 8, 1981, August 24, 1981, and September 4, 1981, regarding three of the subject Detroit News articles. Defendants submitted an identical interrogatory, containing six subparts, on each of the 258 sentences contained in these three articles. The circuit court, recognizing that defendants had, in essence, submitted 1,548 interrogatories in less than a month, upheld plaintiffs' objections to these interrogatories. However,

the circuit court suggested that defendants redesign their interrogatories to relate to the articles as a whole:

> Well, why don't you ask them on the article as a whole? . . . If you want to revise your interrogatories to ask them the same question dealing with the articles as a whole, fine, I will order them to answer it . . . so I would be perfectly happy to make them answer it as a whole.

(Hearing transcripts, pps. 6-7).

Defendants later filed a fourth set of interrogatories which plaintiffs subsequently answered. Plaintiffs' answers to defendants' fourth set of interrogatories reflected that plaintiffs' claims *were not necessarily* based on a particular false statement but that *the entire series of articles falsely portrayed, insinuated, imputed and/or implied that plaintiffs, among other things, were members and/or associates of an organized criminal society otherwise known as the "Mafia".*

After receiving these answers to interrogatories, and after apparently misreading the clear language of these answers, defendants once again moved for summary judgment, this time pursuant to GCR 1963, 117.2(3) (no genuine issue as to any material fact), but without a proper supporting affidavit, as noted in plaintiffs' Brief in Response to Defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, at p. 2-3. Defendants apparently proceeded on the theory that plaintiffs were required to establish that *a particular sentence* in a particular article was "factually false".

The circuit court denied defendants' second motion for summary judgment on the basis that the "factual falsity" requirement was not limited to direct statements

but that it also pertains to implications, imputations and insinuations, the trial court's denial of this second motion was caused, at least in part, by defendants' inability to cite *one* case in support of defendants' position.

Following defendants' reliance at oral argument on the case of *Schultz v. Reader's Digest Ass'n*, 468 F Supp 551 (ED Mich 19), the trial court stated:

> THE COURT: I read the case. Don't bother going into it. I just read it.
>
> * * *
>
> THE COURT: I don't think the Hoffa case [*Schultz*] is on point at all, because in the Hoffa case the judge was making a ruling as a matter of law that plaintiff would not be able to show actual knowledge for reckless disregard. This issue is not before this court.
>
> * * *
>
> THE COURT: In the Schultz case I think there is definitely language that goes against your case. On page five fifty-four the court goes into a long discussion of if words are susceptible of different interpretations it's for the jury to say whether or not they were defamatory. There's a whole long discussion about this.
>
> * * *
>
> THE COURT: The tenor of the articles could be interpreted as false. Implying that this is a Mafia member. Implying that they are criminals. The whole tenor of it. I think that is what we have been talking about with all these motions. The tenor of the articles.
>
> * * *

MR. STEWART (defendants' counsel):

> I will say to you today, for the purpose of this argument I agree. For the purpose of this argument it's capable of defamatory interpretation. Let's assume we all agree.

(April 2, 1982, hearing transcript, p. 4, lines 24-25; p. 5, lines 12-16; p. 6, lines 9-14; p. 8, lines 18-22; p. 15, lines 13-16).

Defendants failed to cite any case other than the *Schultz* case to the trial court on oral argument of their second motion for summary judgment (pursuant to GCR 1963, 117.2(3)). At no time has the trial court found that plaintiffs are public officials or public figures or that defendants' unsubstantiated implications concerned a matter of public interest. The circuit court entered its Order denying defendants' motion on April 6, 1982.

After defendants indicated an intent to appeal, the trial court refused to certify defendants' proposed controlling question, as defendants had failed to establish that there existed *any* authority in support of their position, and therefore, there was no indication that there existed *any* ground for difference of opinion, pursuant to GCR 1963, 806.3(1) (a) (ii) (certification of controlling questions of law "as to which there is substantial ground for difference of opinion").

Defendants thereafter filed an Application for Leave to Appeal to this Court, which was opposed by plaintiffs but granted by this Court on August 3, 1982.

Plaintiffs specifically deny several of the most outrageous falsehoods contained in defendants' purported "Statement of Facts" in defendants' Appellants' Brief on

Appeal. First, defendants falsely state that plaintiffs each have a "conviction for loan fraud"; neither plaintiff has ever been convicted of loan fraud. Second, contrary to what defendants know to be the truth, plaintiffs have never "admitted that the articles contain no false statements of fact"; such misrepresentation merely highlights defendants' utter disrespect for both the truth and this Court, and clearly overlooks the plain, simple and clear language of plaintiffs' answers to interrogatories, wherein plaintiffs' stated in part that "the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation. . . ." Third, defendants again blatantly misrepresent the truth by stating that, "[i]n opposing this motion, appellees again admitted that each and every statement contained in the news reports was true. . . ." Plaintiffs respectfully suggest that any reliance which might be placed by this Court on defendants' purported "Statements of Facts" be undertaken only after careful and detailed scrutiny and with caution.

———o———

ARGUMENT

I. DEFENDANTS, AFTER FAILING TO SEEK TIMELY REHEARING OR APPEAL, ARE NOW PRECLUDED FROM RAISING ON INTERLOCUTORY APPEAL AN ALLEGATION THAT "PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR LIBEL".

Defendants' initial motion for summary judgment pursuant to GCR 1963, 117.2(1), was filed on or about April

30, 1981. Under GCR 1963, 117.2(1), defendants in this case argued that plaintiffs had "failed to state a claim upon which relief can be granted". This question—whether plaintiffs had failed to state a claim—was argued before the trial court and denied by the trial court. An order specifically denying summary judgment pursuant to GCR 1963, 117.2(1), was entered by the trial court during 1981. No motion for rehearing, pursuant to Wayne County Circuit Court Rule 119.8 or otherwise, was ever filed. No interlocutory appeal of the denial of defendants motion pursuant to GCR 1963, 117.2(1), was ever sought, much less granted. Nowhere in defendants' June 1, 1982, Application for Leave to Appeal to this Court (granted August 3, 1982) do defendants assert or allege any basis for appeal grounded on GCR 1963, 117.2(1).

As this Court has stated time and again, this Court will not consider those issues [not] properly before it, including those issues not preserved for appeal. *See, e.g., Dale v. Whiteman,* 388 Mich 698; 202 NW2d 797 (1972). Plaintiffs respectfully submit that defendants' belated attempt to resurrect defendants' arguments that plaintiffs have failed to state a cause of action for libel were not preserved for appeal due to defendants' previous acquiescence in the trial court's denial of defendants' initial motion for summary judgment and defendants' failure to assert that non-issue as a ground for appeal at the present time.

Even at this belated date, defendants apparently fail to note the clear language of plaintiffs' May 12, 1982, Second Amended Complaint, which states at Count I:

(1) "[D]efendants falsely, wickedly and maliciously said of and/or insinuated that plaintiffs . . .

were persons engaged in organized crime. . . ." (paragraph 2); and

(2) "[S]aid publications were false and/or created false implications. . . ." (paragraph 3).

Thus, plaintiffs' Second Amended Complaint clearly pleads false publications and states a claim against defendants. While plaintiffs respectfully submit that defendants' belated attempts to resurrect pleading arguments is wholly improper and untimely, plaintiffs in the alternative respectfully submit that said arguments are entirely moot.

II. DEFENDANTS FAILED TO COMPLY WITH THE REQUIREMENTS OF GCR 1963, 117.2(3), WHEN PRESENTING THEIR SECOND MOTION FOR SUMMARY JUDGMENT, AND THEREFORE, THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION.

Defendants' second motion for summary judgment, dated March 12, 1982, is expressly brought based upon the provisions of GCR 1963, 117.2(3), "that except as to the amount of damages there is no genuine issue as to any material fact, and the moving party is, therefore, entitled to judgment as a matter of law".

Defendants, however, overlooked the crystal clear mandatory language of GCR 1963, 117.3, which states in part:

> A motion based upon sub-rule 117.2(3) *shall* be supported by affidavits, and the opposing party prior to the day of hearing may serve opposing affidavits. The affidavits submitted by either party shall be governed by the provisions of sub-rule 116.4, 116.5, and 116.6. (emphasis added).

These sub-rules, and GCR 1963, 116.4, in particular, state in part:

> Supporting and opposing affidavits shall be made on personal knowledge and shall set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the pleading or motion. Such affidavits shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts contained therein.

Contrary to these unambiguous rules, defendants failed to submit a proper affidavit in support of their second motion for summary judgment. The sole affidavit attached to defendants' second motion for summary judgment (other than the Proof of Service) stated only:

> "James E. Stewart, being first duly sworn, states as follows:
>
> 1. That he is a partner in the firm of Butzel Long Gust Klein & Van Zile, attorneys for all defendants except Gene Grudi in the above case;
>
> 2. That he has read the within Motion for Summary Judgment as to Plaintiffs' Libel Claims, and the contents are true and accurate *to the best of his knowledge and belief, except as to those matters therein stated to be upon information and belief, and as to those matters, he believes them to be true.*" (emphasis added).

Plaintiffs respectfully submit that Mr. Stewart's affidavit failed to comply with the clear requirements of GCR 1963, 116.4, 117.2(3) and 117.3. Further, this defect was succinctly raised in the trial court in plaintiffs' Brief in Response to Defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, at pp 2-3. The importance of a meaningful affidavit has been repeatedly recognized in the context of motions for summary judgment pursuant

to sub-rule 117.2(3). *See, e.g.,* 1 Honigman & Hawkins, 1982 Supp, p 145 ("The supporting affidavit, which *must* be filed with such a motion, identifies those facts which may appear to be controverted in the peadings but which, the mover asserts, cannot be genuinely disputed.") (emphasis added); *Hayes v. Booth Newspapers, Inc,* 97 Mich App 758, 295 NW2d 858 (1980) (granting sub-rule 117.2(3) motion without proper supporting affivadit will result in *per se* reversal); *DeMare Bros Constr Co Inc v Teska,* 49 Mich App 642, 212 NW2d 602 (1973) (same). *See also,* 1 Honigman & Hawkins, 1982 Supp, p 147 (affivadits by attorney for movant based upon "best of information and belief" do not conform with sub-rule 117.3 and 116.4); *Peck v Auto Owners Ins Co,* 112 Mich App 329; 315 NW 2d 586 (1982) (same).

Therefore, under the clear mandatory language of the General Court Rules, as interpreted by this Court in both *Hayes* and *DeMare Bros. Constr. Co., Inc., supra,* defendants failed to comply with the requirements of GCR 1963, 117.2(3), when presenting their second motion for summary judgment, and therefore, the trial court properly denied defendants' motion on this ground alone.

III. THE TRIAL COURT'S FINDING WAS SUPPORTED BY THE RECORD BEFORE IT.

In *Peisner v. Detroit Free Press,* 82 Mich App 153, 164, 226 NW2d 693 (1978) (Peisner II), this Court set forth the factors to be considered by a trial court when considering a motion for summary judgment pursuant to GCR 1963, 117.2(3):

> Motions for summary judgment under GCR 1963, 117.2 (3) are not proper unless no genuine issue as to any

material fact remains. In passing on the motion, *benefit of every reasonable doubt must be given to the party opposing the motion.* Summary Judgment under this provision is designed to test whether factual support exists for the claim made. Affidavits, pleadings, depositions, admissions, and other documentary evidence must be considered by the court. *Courts are liberal in finding that a genuine issue does exist, in order not to infringe upon a party's right to trial of disputed factual issues. Rizzo v. Kretschmer,* 389 Mich 363, 370-374; 207 NW2d 316 (1973); *Wynglass v. Prudential Life Ins. Co.,* 68 Mich App 514, 516; 242 NW2d 824 (1976); *McLaughlin v. Consumers Power Co.,* 52 Mich App 663, 666; 218 NW2d) 122 (1974). (emphasis added)

The thrust of defendants' second motion for summary judgment appears to be an argument that no genuine issue of fact remains simply because plaintiffs allege that defendants' publications gave rise to false implications, insinuations, imputations and portrayals and that, as a matter of law and fact, plaintiffs' claim cannot be sustained. Plaintiffs respectfully submit that defendants overlook the vast majority of defamation authorities which, having considered this question, clearly hold that a defamation action may be successfully maintained by plaintiffs alleging false implications, insinuations, imputations and portrayals.

A. False Implications, Insinuations, Imputations and Portrayals are as Capable of Being Defamatory as are Actual False Statements.

Despite defendants' inference that false implications, insinuations, imputations and portrayals are incapable of defamatory interpretation if contained in an article which is on its face true, virtually every court which has con-

sidered this issue has held that factually accurate words may be capable of defamatory interpretation.

Considering this same issue, the Supreme Court of Tennessee in *Memphis Publishing Co. v. Nichols,* 569 SW2d 412, 419-420 (Tenn 1978), in the context of a defamation action alleging that defendant newspaper's factual accurate report gave rise to an implication of an adulterous relationship, stated in pertinent part:

> Whether the news article published by the defendant newspaper concerning the shooting episode at the Nichols' home was, in fact, understood by readers in its defamatory sense is ultimately a question for the jury. But preliminary determination of whether the article is *capable* of being so understood is a question of law to be determined by the court. In our opinion, defendant-newspaper's motion for a directed verdict in this case must be resolved in favor of Mrs. Nichols. When read and construed in the sense in which the reader would ordinarily understand it, the clear implication of the article is that Mrs. Nichols and Mr. Newton had an adulterous relationship and were discovered by Mrs. Newton, thus precipitating the shooting incident. If so read, it can hardly be doubted that Mrs. Nichols' reputation would be injured.
>
> * * *
>
> In this case, the defendant newspaper does not assert that Mrs. Nichols and Mr. Newton in truth had an adulterous relationship. Nevertheless, the defendant's principal defense is that all material facts stated in the new article were substantially true, emphasizing in its brief:
>
> > 'IT IS OF CRUCIAL IMPORTANCE TO NOTE THAT THE RECORD REFLECTS THAT EVERY MATERIAL FACT IN THE ARTICLE QUOTED ABOVE WAS TRUE.
> >
> > * * *

> Mrs. Nichols *was in fact* treated at St. Joseph Hospital for a bullet wound in her arm after the shooting. A 40-year old woman *was in fact* held by police in connection with the shooting. A shot *was in fact* fired at the suspect's husband. The suspect *did in fact* find her husband at the Nichols' home with Mrs. Nichols. The suspect *did in fact* fire a shot at her husband and then at Mrs. Nichols and *did in fact* strike her in the arm. No charges *had in fact* been placed at the time of the writing of this article.'
>
> In our opinion, the defendant's reliance on the truth of the facts stated in the article in question is misplaced. The proper question is whether the *meaning* reasonably conveyed by the published words is defamatory, 'whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' *Fleckenstein v. Friedman,* 266 N.Y. 19, 23, 193 N.E. 537, 538 (1937). The publication of the complete facts could not conceivably have led the reader to conclude that Mrs. Nichols and Mr. Newton had an adulterous relationship. The published statement, therefore, so distorted the truth as to make the entire article false and defamatory. It is no defense whatever that individual statements within the article were literally true. Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true. *See Brown v. First National Bank,* 193 N.W. 2d 547, 553 (Iowa 1972).

(citations generally omitted) (emphasis as in original).

Other jurisdictions have considered the question of defamation by implication, insinuation, imputation, and portrayal, and have adopted the same position as the authorities above. For example, in *Schaefer v. Lynch,* 406 So 2d 185, 188 (La 1981), the Louisiana Supreme Court stated in pertinent part:

> The article is defamatory in the sense that it tends to diminish the public's respect for [plaintiff]. A defamatory meaning is insinuated. When truthful statements carry a defamatory innuendo, the implication should also be true to justify publication. . . . *Madison v. Bolton, supra,* correctly held that truthful statements which carry a defamatory implication can be actionable.

(citations omitted). Similarly, the Massachusetts appellate courts have considered this issue time and again and have recognized liability "for what is insinuated as well as for what is stated expressly." *Mikhalik v. Duprey,* 417 NE 2d 1238, 1239 (Mass App 1981) (citing six additional cases in support). The Massachusetts Supreme Judicial Court has also recently reiterated that:

> The test of whether a publication is defamatory is whether, in the circumstances, the writing discredits the plaintiff "in the minds of any considerable and respectable segment in the community."

Tropeano v. Atlantic Monthly Co., 379 Mass 745, 400 NW 2d 847 (Mass 1980). A slightly different test has been used by California courts, namely, what is the probable effect of a publication upon the mind of the ordinary reader. *See, e.g., Howard v. Southern California Associated Newspapers,* 95 Cal App 2d 580, 213 P 2d 399 (1950), *overruled in part, on different grounds, Field Research Corp. v. Superior Court,* 77 Cal Rptr 243, 453 P 2d 747 (1969) (scope of California punitive damages statute); *Harris v. Curtis Publishing Co.,* 49 Cal App 2d 340, 121 P 2d 761 (1942).

Still other jurisdictions have also held that implications, insinuations, imputations and portrayals may be defamatory. In *Marion v. Davis,* 217 Ala 16, 18, 114 So

357, 359 (1927), the Alabama Supreme Court stated in part:

> It is not necessary to render words defamatory and actionable that they make defamatory charges in direct terms; they are equally actionable if the charge is made indirectly or by necessary inference, and it matters not how artful or disguised their meaning is concealed, if they are in fact defamatory.

The Iowa Supreme Court has observed in *Turner v. Brien,* 184 Iowa 320, 326, 167 NW 584, 586 (1918), that "it is the thought conveyed, not the words, that does the harm," while the Delaware Supreme Court has similarly noted, in *Rice v. Simmons,* 2 Harr (Del) 417, 433, 31 Am Dec 766 (1839), that:

> The character of a libel is to be judged of by the effect it produces on the mind, . . . and the attempt to show in what it consists may depend much on inferential reasoning.

Finally, as noted in the trial court on oral argument, the Fifth Circuit Court of Appeals' decision in *Caldwell v. Crowell-Collier Publishing Co.,* 161 F2d 333, 335-336 (CA 5), *cert. denied,* 332 US 766, 68 S Ct 74, 92 L Ed 51 (1947), is instructive. Construing a nationwide publication, the Fifth Circuit stated:

> A libel is a compound of written falsity and malicious publication, but *the falsity may consist in untrue imputation as well as a direct statement,* and malice may be inferred from the nature of the charges made. *False imputations may be actionable per se,* that is in themselves, *or per quod,* that is on allegation and proof of special damages.
>
> • • •
>
> It is not necessary that the false charges be made in a direct manner, if the words in their ordinary mean-

> ing convey it, and *an insinuation is as actionable as a positive assertion* if the meaning is plain. (emphasis added)

Accordingly, the Fifth Ciruit reversed the trial court's dismissal of plaintiff's suit based upon failure to state a claim. *See also Schultz v. Reader's Digest Ass'n,* 468 F Supp 551, 554 (ED Mich 1979) (it is for the jury to determine the way in which an article susceptible of both defamatory and non-defamatory interpretations is understood).

Other authorities reaching the same conclusion—that implications, insinuations, imputations and portrayals may be actionable—include Gatley, *Libel & Slander* (4th ed 1953), pps 18-21 ("A defendant is liable for insinuation as well as for explicit statement, for insinuation may be as defamatory as direct assertion and even more mischievous."); 33 Am Jur, Libel and Slander, §§5, 9, 45; Prosser, *Torts* (4th ed 1971), §111 ("In order that defendants' words be defamatory, they must be understood in a defamatory sense. . . . [T]here may be defamation by means of a question, an indirect insinuation, an expression of belief or opinion, or sarcasm or irony.") *See also Williams v. Hicks Printing Co.,* 159 Wisc 90, 150 NW 183, 188 (1914) ("conditional privilege . . . does not extend to unjust inferences. . . . "; *Zbyszko v. New York American, Inc.,* 228 App Div 277, 239 NYS 411 (1930) (defamation by implication actionable); *Duncan v. The Record Publishing Co.,* 145 SC 196, 143 SE 31 (1927) ("But it does not follow that such literal truth was a complete defense, as appellants contended. The plaintiff's cause of action for libel was predicated upon the charge that the publication, literally true as it was, was intended to convey and conveyed to readers thereof the defamatory meaning attributed thereto. . . ."); Spiegel,

Defamation by Implication—In the Confidential Manner, 29 So Cal L Rev 306 (1956).

B. Michigan Law Also Recognizes that False Implications, Insinuations, Imputations and Portrayals are Actionable as Defamatory.

Numerous Michigan decisions have recognized that false implications, insinuations, imputations and portrayals are actionable as defamatory. For example, the Michigan Supreme Court in *Nuyen v. Slater,* 372 Mich 654, 662; 127 NW 2d 369 (1964), stated:

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

Thus, while not directly discussing false implications, the Supreme Court clearly contemplates both express and implied defamation. Other Michigan decisions, including many cited by defendants themselves, support this conclusion. In *Kenney v. Hatfield,* 351 Mich 498, 512, 88 NW 2d 535 (1958), the Michigan Supreme Court acknowledged:

> It is generally held that a publication *imputing* impairment of mental faculties is libel per se, and we agree with plaintiff and appellant that the publication complained of here is such. (emphasis added).

Consideration of natural or logical implications, insinuations, and imputation is also recognized in *Hysko v. Polonia Publishing Co.,* 239 Mich 676, 681, 215 NW 3 (1927), where the Supreme Court stated, in a defamation context:

> The words used are to be taken in the sense in which they would be understood by those who read them.

As noted by defendants, the Michigan Supreme Court has often considered *the extent* of inference to be recognized

as libelous. *See, e.g., Van Lonkhuyzen v. Daily News Co.,* 195 Mich 283, 295, 161 NW 979 (1917); *Simons v. Burnham,* 102 Mich 189, 195-197 (1894). But these older cases, relied upon by defendants, against make clear that the scope of defamation includes liability for inferences; as stated by the Supreme Court in *Simons, supra:*

> We can understand how words may be used and understood in a different, and even opposite, sense from what they naturally and ordinarily import, as where used ironically, or in the nature of slang, or as a quotation having a well understood significance, or where they are used in a cipher; but in all such cases it is necessary that the declaration should allege facts which, if proved, will enable a court to say that these words, interpreted in the light of them, may reasonably be held to bear the construction claimed, *leaving to the jury* the truth or falsity of the allegations upon which the alleged meaning depends, as well as *the question of the meaning.*
>
> * * *
>
> We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences, *though we must recognize a distinction between inferences which are the natural result of implications contained in the language of the publication . . . and inferences drawn only from the facts themselves. In the former case the action may lie,—not because of the inference, but by reason of the implication;* in the latter it will not. (emphasis added).

Thus, even under the Supreme Court's 1894 decision in *Simons,* plaintiffs herein are recognized to have a cause of action in defamation against defendants based upon the implications arising out of defendants' inferences. *See also Sanders v. Evening News Ass'n,* 313 Mich 334, 343, 21 NW 2d 152 (1946) (defendants' publications must

be "fairly and reasonably construed"); *Edwards v. Chandler,* 14 Mich 471, 476, 90 Am Dec 249 (1866) ("[W]e are not prepared to say that a jury could not draw such an inference without unreasonably stretching or perverting the sense. Such language must be construed by the jury, and not by the court."); *Dawson v. Wright,* 8 Med L Reptr 2001, 2002 (Oakland County Circuit Court No. 80-206224, decided April 30, 1982) ("the article is reasonably susceptible of a defamatory interpretation").

Thus, Michigan case law clearly supports the widely recognized principle that false implications, insinuations, imputations, and portrayals are actionable. *See also* MCLA 600.2911(1) (imputation of unchastity as defamatory).

C. The Trial Court's Finding was Supported By the Record Before It.

Contrary to defendant's misrepresentations, at no time have plaintiffs admitted that the articles in question are factually or otherwise true. At no time during this litigation has the trial court found plaintiffs to be either public figures or public officials (plaintiffs expressly deny that they are either public figures or public officials). At no time during this litigation has the trial court found defendants' articles regarding plaintiffs to be comment on a matter of public interest (plaintiffs deny that any matter regarding plaintiffs own lives is a matter of public interest). At no time during presentation of their motion for summary judgment pursuant to GCR 1963, 117.2(3), have defendants submitted a proper affidavit in support of that motion. During oral argument on defendants' second motion for summary judgment, defendants were

unable to cite any authority in support of their position. Defendants' second motion for summary judgment was actively opposed by plaintiffs, with proper and unrebutted supporting affidavits signed by plaintiffs specifying denying defendants' false implications, insinuations, imputations and portrayals. All law presented during oral argument on defendants' second motion for summary judgment supported plaintiffs' position.

In light of the above record—the same record before the trial court when it heard defendants' second motion for summary judgment—it is ludicrous for defendants to contend that the trial court's order denying defendants' motion was "clearly erroneous" as alleged in defendants' Application for Leave to Appeal to this Court. Plaintiffs respectfully submit that the trial court's finding of a factual issue—whether defendants' articles were capable of a defamatory interpretation—was not clearly erroneous. *By analogy, see Superior Prod v. Merucci Bros,* 107 Mich App 153, 309 NW 2d 188 (1981) (an appellate court will set aside a trial court's findings of fact only where the findings are clearly erroneous).

D. In the Absence of Any Trial Court Finding of Public Figure/Public Official/Public Interest Status With Regard to This Litigation, Defendants' Federal Constitutional Argument is Not Properly Before This Court, is Premature, and Confuses Defamation Concepts.

Defendants rely upon three cases in support of defendants' federal constitutional argument, *Gertz v. Robert Welch, Inc,* 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974) (Gertz I); *Wilson v. Scripps-Howard Broadcasting Co,* 642 F 2d 371 (CA 6), *cert granted,* 454 US 962, 102

S Ct 500, 70 L Ed 2d 377 (1981) (settled prior to oral argument, National Law Journal, June 21, 1982, p. 9); and *Orr v. Argus-Press,* 586 F 2d 1108 (CA 6, 1978), *cert. denied,* 440 US 960, 99 S Ct 1502, 59 L Ed 2d 773 (1979). Plaintiffs respectfully submit that defendants' federal constitutional argument is not properly before this Court, is premature, and confuses unnecessarily different defamation concepts.

In the trial court defendants' second motion for summary judgment briefly discussed the Sixth Circuit's implementation in *Wilson, supra,* of the United States Supreme Court's decision in *Gertz, supra.* In the trial court, *Gertz* was cited by defendants for the proposition that states may impose defamation liability upon a publisher or broadcaster so long as liability is not imposed without fault. Plaintiffs stand ready to prove that fault at trial, but are not required to prove fault on defendants' motion for summary judgment, only that a factual issue exists, which is the case unless defendants are admitting the falsity of their publications. It must be remembered that *Gertz* involved the reversal by the Supreme Court of the trial court's entry of judgment n.o.v., after full trial, and therefore presents a dissimilar test. The trial court's finding in this case did not impose liability without fault on defendants; rather, the trial court held only that a genuine issue of material fact had been presented.

With regard to defendant's reliance on *Wilson, supra,* plaintiffs again note that the appellate court's language must be viewed in the appropriate context—post-verdict, not on a motion for partial summary judgment before plaintiffs had opportunity to depose defendants. Again,

plaintiffs anticipate imposing liability based upon fault at trial in this case.

Considering defendants' reliance on *Orr, supra,* plaintiffs are compelled to note that *Orr* is another post-judgment appeal, not an interlocutory appeal. Further, reliance on *Orr* is misplaced and inappropriate as *Orr* specifically included a finding that plaintiff was a public figure and a finding of public interest, thereby requiring an actual malice standard inapplicable in this matter where no court has made any such finding on either issue.

Plaintiffs do not dispute that a different standard may apply post-judgment, after trial, but respectfully submit that defendants' premature application of post-trial standards in seeking to overturn a trial court finding that plaintiffs' unrebutted affidavits at a minimum created a genuine issue of material fact under GCR 1963, 117.2(3), is erroneous and unnecessarily confuses defamation concepts.

Plaintiffs also note for purposes of clarification that defendants' use of related jury instructions (3 Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed), § 84.08) at pages 8-9 of defendants' Brief on Appeal is seriously misleading; even a cursory review of this material in the original clearly indicates the caption on the instruction: "Libel in *Privileged* Situation—Essential Elements" (emphasis added). As stated above, there has been no finding that this case involves (a) a public figure; (b) a public official; or (c) a matter of public interest. Absent such a supportable finding, no privileged situation exists, and defendants' misrepresentation (including a requirement "actual malice" under the sixth part of the

instruction) that this instruction is in any way applicable to this case must be disregarded by this Court.

SUMMARY

In the trial court defendants sought summary judgment based upon the alleged absence of a genuine issue of material fact. Several aspects of defendants' Brief on Appeal raise issues arising out of a 1981 trial court order denying defendants' motion for summary judgment for failure to state a claim upon which relief could be granted; these aspects and issues were not preserved for appeal and may not properly be considered by this Court as part of this appeal.

Further, defendants' second motion for summary judgment was defective in that it was not supported by a proper affidavit under GCR 1963, 117.3. This defect was raised in the trial court by plaintiffs, yet not cured by defendants. This Court has repeatedly held that summary judgment shall not be granted under such circumstances.

Finally, defendants allege that there can be no defamation based upon false implications, insinuations, imputations, and portrayals. As demonstrated by plaintiffs at length, numerous state and federal court decisions clearly indicate that false implications, insinuations, imputations, and portrayals clearly are actionable, particularly with a private individual and private matters such as in this case. Michigan decisions repeatedly have held that a defamation action may be maintained based upon false implications, insinuations, imputations, and portrayals. *See, e.g., Simons v. Burnham, supra.* No finding of applicable privilege, based on public figure/official or

public interest or otherwise, has been made by the trial court, and this issue is not before this Court on appeal. Further, case law is clear, contrary to defendants' implied assertion, that different standards of proof are to be used when determining a motion for summary judgment not supported by proper affidavits than when reviewing trial proofs in a post-judgment proceeding.

Plaintiffs respectfully submit that the trial court's decision in this matter was proper and must be affirmed.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully pray and ask this Honorable Court to affirm the trial court's May 6, 1982, order denying defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claim, together with costs and attorneys' fees to plaintiffs most unjustly sustained.

Respectfully submitted,

KITCH, SUHRHEINRICH, SMITH, SAURBIER & DRUTCHAS, P.C.

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(313) 964-5890

Dated: January 26, 1983

STATE OF MICHIGAN
IN THE COURT OF APPEALS

Court of Appeals
No.: 64729

Wayne County Circuit
Court No.: 80-012145 CZ

JOSEPH JUDEUS LOCRICCHIO and
GARY FRANCELL,

Plaintiffs-Appellees,

v

THE EVENING NEWS ASSOCIATION, INC., a Michigan Corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, jointly and severally,

Defendants-Appellants.

AFFIDAVIT OF COUNSEL

STATE OF MICHIGAN)
SS:
COUNTY OF WAYNE)

STEPHEN M. KELLEY, being first duly sworn, deposes and says that he is an attorney for plaintiffs in this matter, and that he has read the foregoing BRIEF ON APPEAL by him subscribed and says that the contents of same are true to the best of his knowledge, information and belief.

Deponent further sayeth not.

/s/ Stephen M. Kelley

Subscribed and sworn to before me
this 26th day of January, 1983.

/s/ Tracy Rae Anger
Notary Public
Wayne County, Michigan
My commission expires: 11/21/84

STATE OF MICHIGAN
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PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

AUDREY BRENNAN, being first duly sworn deposes and says that she is employed by the law firm of KITCH, SUHRHEINRICH, SMITH, SAURBRIER & DRUTCHAS, P.C., attorneys for Plaintiffs herein; that

on the 26th day of January, 1983, she did serve a true copy of PLAINTIFFS' BRIEF ON APPEAL, AFFIDAVIT OF COUNSEL, and AFFIDAVIT OF SERVICE, upon the following attorney of record:

JAMES E. STEWART
1881 FIRST NATIONAL BLDG.
DETROIT, MICHIGAN 48226

by enclosing same in an envelope addressed to same and depositing said envelope in the U.S. postal receptacle in the Buhl Building, Detroit, Michigan.

Deponent further saith not.

/s/ Audrey Brennan

Subscribed and sworn to before me
this 26th day of January, 1983.

/s/ Tracy Rae Anger
Notary Public
Wayne County, Michigan
My commission expires: 11/21/84